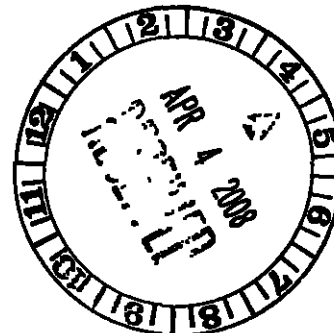


PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

222010



E.I. DUPONT DE NEMOURS AND COMPANY)

Complainant,)

v)

CSX TRANSPORTATION, INC.,)

Defendant)

Docket No NOR 42100

COMPLAINANT'S REBUTTAL EVIDENCE

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April 4, 2008

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- 3) Rebuttal Verified Statement of Steve Thomas, Global Business Manager – Titanium Intermediates, DuPont Titanium Technologies
- 4) Rebuttal Verified Statement of Thomas D Crowley, President, L E Peabody and Associates, Inc , Alexandria, Virginia

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COMPLAINANT'S REBUTTAL EVIDENCE

Complainant E I. du Pont de Nemours and Company ("DuPont") hereby submits its Rebuttal Evidence in response to the Reply Evidence of defendant, CSX Transportation, Inc ("CSXT"), filed in this proceeding on March 5, 2008. This Rebuttal Evidence consists of two parts: (a) an Argument that summarizes the evidence submitted and discusses the legal standards to be applied in this case; and (b) the Rebuttal Verified Statements and accompanying exhibits of: (1) Ms Mary Pileggi, North American Region Logistics Manager, DuPont Logistics, Global Sourcing and Logistics ("Pileggi Reb. V S "), (2) Ms Michelle Moore, an Executive Buyer of raw materials for DuPont ("Moore Reb V S "). (3) Mr Steve Thomas, Global Business Manager - Titanium Intermediates, DuPont Titanium Technologies ("Thomas Reb V S "), and (4) Mr Thomas D Crowley, President, L E Peabody and Associates, Inc ("Crowley Reb V S ")

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PART I—ARGUMENT

DuPont has challenged the reasonableness of CSXT's rail transportation rates in this small rate case, and two others, under the Three-Benchmark approach adopted by the Board in *Simplified Standards for Rail Rate Cases*, Ex Parte No 646 (Sub-No 1), decision served September 7, 2007, *petition for reconsideration denied* March 19, 2008 ("*Simplified Standards*") In this proceeding, DuPont has challenged CSXT's rates for three movements of chlorine, STCC 2812815, from Niagara Falls, NY to New Johnsonville, TN ("Niagara Falls Movement"), from Natrium, WV to New Johnsonville, TN ("Natrium Movement"); and from Niagara Falls, NY to Carneys Point, NJ ("Carneys Point Movement").

As a threshold matter, DuPont has unequivocally established CSXT's market dominance over all three of the movements at issue CSXT cannot credibly claim that it lacks market dominance over movements of a commodity that, by its own admission, CSXT no longer prices according to market conditions and would prefer not to transport at all This is true even when, as is the case for the Natrium Movement, an intermodal alternative exists, because despite the presence of the alternative, there is no constraint upon the rail carrier's rates

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DuPont and CSXT have proposed "final offer" comparison groups that differ in three criteria. In the aggregate, the differences show that DuPont has selected the most similar comparison groups to the issue movements.

First, DuPont has selected its comparison groups from all movements of toxic-by-inhalation ("TIH") commodities, whereas CSXT has selected its groups only from other chlorine movements. Although the CSXT group is narrower, DuPont has reasonably and justifiably relied upon CSXT's own statements that it prices all TIH commodities based upon risk, without regard for traditional market factors. Because CSXT claims that the risks of hauling TIH commodities are the same, DuPont has more completely identified the universe of comparable commodities.

Second, although both parties have applied the same criteria for selecting comparable movements based upon distance, only DuPont has applied that criteria to the proper length of haul for the issue movement. DuPont has used the issue movement miles derived from the same source as the Waybill Sample, whereas CSXT has used internal records that cannot be verified by DuPont. Since the Board has prohibited the parties from selecting comparable movements based upon any information other than from the Waybill Sample or a public source, CSXT's miles are *de facto* unreasonable.

The third, but most significant, difference is that CSXT has added a fuel surcharge criteria that overstates the reasonable level of contribution to joint and common costs. CSXT has excluded all movements without an amount in the "Miscellaneous Charges" field of the Waybill Sample on the unproven assumption that fuel costs were not recovered on those movements. But, even if the Board were to accept this assumption as true, the fuel surcharge methodology applied by CSXT from 2002 to 2005 was subsequently declared to be an unreasonable practice.

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because that methodology over-recovered actual changes in fuel costs for individual movements in order to cross-subsidize movements without a fuel surcharge. By restricting its comparison groups to only movements that over-recovered fuel costs, CSXT has artificially inflated the R/VC ratios. In contrast, by not including a fuel surcharge factor in its selection of the comparison groups, DuPont has averaged the effect of CSXT's fuel surcharge over-recovery against CSXT's alleged under-recovery on other movements. Thus, the DuPont comparison groups are eminently more reasonable and similar in the aggregate to the issue movements.

DuPont has proposed two adjustments to the average R/VC ratios of the comparison groups to account for "other relevant factors." First, DuPont has applied the Board's recently-adopted capital asset pricing methodology ("CAPM") to recalculate the RSAM and R/VC>180 benchmarks for 2002 through 2005, in order to "ensure the availability of accurate cost information in regulatory proceedings." 49 U.S.C. 10101(14). CSXT wrongly asserts that this adjustment would constitute an impermissible retroactive rulemaking. But, this would not be a retroactive rulemaking because it does not take away or impair vested rights acquired under existing law. Nor does it impact any settled expectations of CSXT in the current RSAM or R/VC>180. Finally, although DuPont did not make adjustments to all of the variables and calculations that would be affected by a switch to CAPM, because the Board has prohibited such adjustments in *Simplified Standards*, the DuPont analysis conservatively understates the reductions to the maximum reasonable rates of making all of those adjustments. DuPont has proven this fact by calculating the maximum reasonable rates of the issue movements, if CAPM were actually applied to all the other variables that CSXT has identified.

Second, DuPont has calculated an efficiency-adjusted RSAM in order to account for the Long-Cannon factors in the statute. The efficiency-adjusted RSAM eliminates traffic being

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carried at less than long-run variable cost. Because there no longer is significant excess capacity in the rail industry, there is no reason for CSXT to be transporting commodities at less than this level.

CSXT also has proposed two adjustments for "other relevant factors." First, CSXT claims that there is a flaw in the RSAM methodology that fails to include taxes in the revenue shortfall. DuPont contends that there is no actual shortfall because URCS overstates the tax component of variable costs by using the statutory tax rates, which in turn overstates the revenue shortfall. However, even if the Board accepts CSXT's contention, the proper fix is to apply CSXT's effective tax rate rather than its statutory tax rate. But, given the multitude of countervailing factors that must be considered before declaring the existence of a flaw in the RSAM methodology and determining how to fix such a flaw, this narrow proceeding between just CSXT and DuPont is not the appropriate forum for deciding these issues.

Second, CSXT improperly has adjusted the revenues and costs of every comparison group movement to 2007 "market" levels, before determining the average R/VC ratio of the group. But, this adjustment would undermine the Board's carefully considered decision to use a 4-year average of all three benchmarks in order to smooth out the impact of market fluctuations over time. CSXT's adjustment also is not objective because it fails to show the countervailing effects that its adjustments would have on the RSAM and $R/VC > 180$, which would decrease the expansion ratio applied to the comparison group average R/VC ratio. CSXT also has failed to demonstrate that its adjustment is necessary or appropriate to reflect any change in the market that is not captured by the R/VC ratio. In fact, DuPont demonstrates that no adjustment is necessary.

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The maximum R/VC ratios that CSXT advocates in this proceeding are anything but reasonable. Even before making its two "other relevant factor" adjustments, the CSXT comparison groups produce maximum R/VC ratios of 342-385%, which would provide DuPont with a rate reduction on just the Niagara Falls Movement. After making its adjustments, the CSXT maximum R/VC ratios are 450-562%. Even at those levels, DuPont would still be entitled to a small amount of rate relief on the Niagara Falls Movement. DuPont Witness Crowley has calculated CSXT's return on equity ("ROE") at these rate levels on a pre- and post-tax basis. Crowley Reb. V.S. at 19-20 & Ex. TDC-26. The pre-tax ROE for the issue movements ranges from 141.7% to 168.4%, compared to the Board's 2005 CAPM weighted average cost-of-capital of 12.9%. The post tax ROE for the issue movements ranges from 99.8% to 118.6% compared to the Board's 2005 CAPM weighted average cost-of-capital of 8.4%. Returns at these levels cannot be reasonable.

In a final attempt to justify such high rates, CSXT claims that it is implementing a new pricing paradigm for TIH movements that attempts to discourage unnecessary and longer distance movements through rail rates, and that the Board would undermine this paradigm by reducing the DuPont rates. CSXT then tries to portray DuPont as the callous shipper who, without CSXT's rate restraints, would ship TIH commodities anywhere and over any distance without regard for the public safety. DuPont demonstrates that nothing could be further from truth. Furthermore, DuPont shows that CSXT is not qualified and does not have the incentives to properly determine which TIH movements are necessary and which have shorter distance alternatives. The reality is that CSXT's new pricing paradigm is merely a thinly disguised attempt to "demarket" TIH commodities in violation of its common carrier obligation and

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contrary to the public interest in the transportation of those commodities by the safest mode available

DuPont presents this Reply Evidence and Argument in seven parts. Part I responds to CSXT's claim that the challenged rates reflect a new pricing paradigm for TIH traffic that the Board must not undermine. Part II responds to CSXT's market dominance evidence. Part III addresses the differences between the parties' variable cost calculations for the issue movements. Part IV compares and contrasts the differences between the parties' "final offer" comparison groups. Part V addresses the "other relevant factors" that each party has presented. Part VI presents the maximum R/VC ratios for the issue movements based on the DuPont "final offer" comparison group, as adjusted by its "other relevant factors." Finally, Part VII summarizes the relief that DuPont requests.

I. CSXT'S NEW PRICING PARADIGM FOR CHLORINE IS BOTH UNLAWFUL AND UNWORKABLE.

CSXT attempts to justify its rates for toxic-by-inhalation ("TIH") commodities, including chlorine, as reflective of a new pricing paradigm that the Board must not undermine by reducing the issue movement rates to DuPont.

While the challenged rates represent a significant increase over DuPont's prior rates, that increase is in line with the market, with relevant commercial forces and business considerations, and with CSXT's reasonable and responsible policies regarding the pricing of chlorine. If the Board does not uphold the rates challenged in this case, it will be undermining the market-based determination of rates (where the market properly takes into account the costs and risks of moving the traffic at issue), and allowing DuPont to shift the costs of its activity onto others, and thwarting CSXT's efforts to discourage long hauls of chlorine and other ultra-hazardous materials.

CSXT Reply Ev. at 46 [emphasis added] DuPont already has shown that CSXT's new pricing paradigm is an attempt to "demarket" the transportation of TIH commodities in violation of its

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common carrier obligation and to the detriment of public health and safety¹ DuPont Reply Ev at 15-18 CSXT's latest claims only serve to emphasize this fact

At the outset, it is absurd for CSXT to claim that the challenged rates reflect "market-based" pricing when no competitive market for the transportation of chlorine exists DuPont has filed this case precisely because CSXT possesses market dominance over the issue movements See Part II, *infra* Moreover, it is widely acknowledged and accepted that chlorine does not move by bulk truck and that barge options are severely limited Thus, in a truly competitive marketplace, it is highly improbable that CSXT could have increased its rates for chlorine by 116% since 2004, a figure that CSXT asserts is conservatively low See CSXT Reply Ev at 42 CSXT's justification of its DuPont rate increases as being "in line with the market" is meaningless when the market is whatever CSXT determines it to be It is precisely this type of pricing that Congress intended the Board to regulate

In addition, CSX I's candid opening evidence admission that it views the transportation of chlorine as an "obligation" rather than a "commercial business opportunit[y]" that CSXT attempts to win in a competitive marketplace, "directly contradicts CSXT's reply evidence claim that its DuPont rate increases are "in line...with relevant commercial forces and business considerations" Compare CSXT Op Ev at 7 with CSXT Reply Ev. at 46 CSXT cannot have it both ways It cannot claim that market considerations are irrelevant to its pricing of TIII commodities and then justify its rates based upon market considerations

As a tacit recognition of these inherently contradictory positions, CSXT also claims that its rate increases constitute "reasonable and responsible policies regarding the pricing of chlorine" *Id* Through this argument, CSX I tries to cloak its high rate levels in safety terms by

¹ In addition to violating its common carrier obligation, CSXT's new pricing paradigm is inconsistent with the constrained market pricing principles in *Coal Rate Guidelines—Nationwide*, 11 C C 2d 520 (1985)

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contending that it is implementing a pricing strategy to discourage unnecessary and longer hauls of TIH commodities. A critical assumption underlying that argument, however, is that CSXT's pricing is the only factor that prevents TIH producers and users from flooding our national rail system with unnecessary and longer movements of TIH commodities in order to get the best deal regardless of the impact upon public safety. Nothing could be further from the truth. Moreover, allowing CSXT, a company that has proclaimed its intent to "demarket" TIH commodities, to be the gatekeeper is akin to placing the fox in charge of the hen house.

From its earliest beginnings as a producer of gunpowder, DuPont has placed the greatest emphasis upon the safety of its employees, customers, and the public at large. As DuPont witness Michelle Moore has explained, the DuPont emphasis on safety includes sourcing chlorine from the closest facilities capable of providing the quantity and quality of chlorine required in its production processes. *See Moore Reply V S* at ¶¶3-4. DuPont has taken these steps out of its commitment to enhancing safety, not as a result of any pricing disincentives from CSXT. *Pileggi Reb. V S* at ¶5. When it comes to safety, DuPont and its rail carriers must closely collaborate to attain a zero release objective. As evidence of their success, DuPont recently received CSXT's 2007 Chemical Safety Excellence Award, which indicates that DuPont had zero non-accidental releases of any hazardous material in 2007. *Id.* at ¶4. Even though DuPont and CSXT are at odds over pricing, on safety there must be no disagreement. *Id.*

That is why DuPont was extremely disappointed to read the Reply Verified Statement of Dean Piacente, CSXT's Vice President for Chemicals and Fertilizer. *Id.* at ¶2. He accuses DuPont of recklessly shipping its "products—no matter how dangerous or how far—wherever DuPont wants them to go." *Piacente Reply V S* at ¶18.² In order to discourage such behavior,

² *See also, CSXT Reply Ev.* at 45.

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Mr. Piacente claims that "CSXT is engaged in a multi-year effort to adjust chlorine rates to (1) discourage unnecessary shipments via CSXT and (2) discourage longer distance shipments via CSXT." *Id.* at ¶10.³ But, how does CSXT determine whether a chlorine shipment is necessary or whether there are shorter distance options, and what qualifies CSXT to make those determinations?⁴ Mr. Piacente's own verified statement illustrates the hazards of leaving those determinations to CSXT.

In support of his accusations against DuPont, Mr. Piacente refers to a recently announced expansion of the DuPont plant at New Johnsonville, TN, to manufacture Titanium Tetrachloride, another TII, "for use in a new paint manufacturing facility" in Utah. *Id.* at ¶19. According to Mr. Piacente, "DuPont, for its own economic benefit, is designing a distribution need that will force a transportation movement of a toxic inhalation hazard over a thousand miles, and through a number of high threat urban areas." *Id.* These statements are full of inaccurate and incomplete facts that highlight precisely why CSXT must not be permitted to decide which TIH shipments are necessary or can be acquired from a closer source.

First, Mr. Piacente wrongly states that the titanium tetrachloride produced at New Johnsonville will be used in a paint manufacturing facility in Utah. In fact, it will be used for titanium metal production. Specifically, it will be used to produce titanium sponge, which is the basic starting material for producing titanium metal. Thomas Reb. V.S. at ¶4. Titanium metal is a vital strategic material used in military and aerospace applications. *Id.* In other words, it is vital to our national security. There are only two significant production facilities for titanium

³ See also, CSXT Reply Ev. at 44.

⁴ In order to make those decisions for chlorine movements, CSXT would have to know every source of chlorine, the purity and specifications of the chlorine and the processes in which it can be used, the total production capacity of each chlorine source, the available production capacity of each chlorine source, and the total volume and quality specifications of chlorine required by the end-user. Moore Reb. V.S. at ¶4.

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sponge in the entire United States, in Nevada and Oregon. *Id.* DuPont will ship its titanium tetrachloride from New Johnsonville to a third facility under construction in Utah.⁵

Second, Mr. Piacente wrongly assumes that DuPont could have avoided this rail haul by building its titanium tetrachloride production at the consumption site in Utah, instead of New Johnsonville. Piacente Reply V.S. at ¶19. Contrary to Mr. Piacente's understanding, DuPont is not building a new titanium tetrachloride production facility at New Johnsonville. Thomas Reb V.S. at ¶3. Titanium tetrachloride is an intermediate in the production of titanium dioxide, which DuPont has produced at New Johnsonville for nearly 50 years. *Id.* DuPont is not expanding this plant for the production of titanium tetrachloride; DuPont already produces it as an intermediate in its titanium dioxide production. Rather, DuPont is installing purification facilities to further purify its current titanium tetrachloride production to meet the purity requirements for titanium metal production. *Id.*

Third, Mr. Piacente inaccurately refers to titanium tetrachloride as a poisonous gas. Piacente Reply V.S. at ¶19. Although it is a TIH commodity, titanium tetrachloride is classified as a corrosive liquid, not a poisonous gas. 49 C.F.R. 172.101. If CSXT cannot even get this basic fact correct, how can it be entrusted to properly ascertain the more detailed and complex facts, like those described above, that are essential to determining whether a TIH shipment is necessary or whether there are in fact shorter distance alternatives? CSXT does not have the qualifications to make such decisions, nor the incentives to make the best decisions in the public interest.

In the final analysis, CSXT's entire discussion of the titanium tetrachloride movement is merely a distraction from the facts of this case before the Board. It has nothing to do with the

⁵ Although Mr. Piacente does not expressly claim that DuPont owns and operates the Utah plant, CSXT's counsel liberally attributes this allegation to him. CSXT Reply Ev. at 45. The Utah plant, however, is not owned or operated by DuPont. Thomas Reb V.S. at ¶4.

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issue movements. Rather, it is a misguided attempt by CSXT to portray DuPont as a callous shipper who chooses "to impose the risks and costs of its sourcing and manufacturing decisions on rail carriers and the people living along the unnecessarily long routes over which it ships poisonous commodities, including chlorine," in order to support CSXT's claim that its TTH rates are the product of "reasonable and responsible policies" that are in the public interest. CSXT Reply Ev. at 45, 46. But simply making these allegations does not make them true. Indeed, DuPont has shown that they are completely false. In the end, all that CSXT has proven is that it is unqualified to make these policy decisions in the public interest because it does not possess the knowledge or expertise to do so.

With regard to this case, CSXT has not demonstrated that DuPont could obtain chlorine from any closer sources than the issue routes, or that the issue movements are unnecessary. The issue movements clearly are not similar to shipments of chlorine from Canada to Florida, at which CSXT claims to be addressing its new pricing paradigm. *Id.* at 46. Furthermore, DuPont has explained how its safety policies ensure that it acquires the chlorine it needs from the nearest available sources. See Moore Reply V.S. at ¶¶3-4. Thus, the only pricing paradigm that is threatened by this case is CSXT's attempt to "demarket" TTH commodities in violation of its common carrier obligation and contrary to the public interest in the transportation of those commodities by the safest mode available.

II. CSXT'S ADMISSION THAT IT DOES NOT PRICE CHLORINE MOVEMENTS IN A COMPETITIVE MARKETPLACE REQUIRES THE BOARD TO CONCLUDE THAT CSXT POSSESSES MARKET DOMINANCE.

Incredulously, CSXT claims that it lacks market dominance over two of the three chlorine movements at issue in this case: the Natrium Movement and the Niagara Falls Movement. This claim is particularly audacious because CSXT [REDACTED]

[REDACTED]

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██████████⁶ views the transportation of chlorine as an "obligation" rather than a "commercial business opportunit[y] that CSXT attempts to win in a competitive marketplace .," CSXT Op Ev at 7 Throughout all of its argument and rhetoric, CSXT pretends that it never made these statements, and similar other statements that DuPont has placed into evidence in this proceeding

CSXT demonstrates a fundamental misunderstanding of the market dominance concept Market dominance means "an absence of *effective* competition from other rail carriers or modes of transportation for the transportation to which a rate applies " 49 U S C 10707(a) [emphasis added] According to the Board, "effective competition" means that, "if a carrier raises the rate for such traffic, then some or all of that traffic will be lost to other carriers or modes " *Market Dominance Determinations and Consideration of Product Competition*, 365 I C C 118, 129 (1981) The courts have adopted a similar definition "At the core of the 'effective competition' standard is the idea that there are competitive, market pressures on the railroads deterring them from charging monopoly prices for transporting goods " *Ariz Pub Serv Co v US*, 742 F.2d 644, 650-51 (D C Cir 1984)

CSXT's decision to "demarket" chlorine and other TIH commodities and to set rates outside of the competitive marketplace are proof that no form of competition actually constrains CSXT 's rates CSXT admits that it no longer prices chlorine according to market conditions⁷ and that no rate can compensate it for the risk of transporting chlorine ⁸ CSXT's observation that "[t]ransporting chlorine is an obligation – not an opportunity," CSXT Op Ev at 7, is proof that CSXT would prefer to lose chlorine traffic to alternative modes These statements ineluctably

⁶ All shaded text is CONFIDENTIAL and HIGHLY CONFIDENTIAL information that has been redacted from the public version of this pleading

⁷ See, CSXT Op Ev at 23 ("Looking back in time, before risk mitigation became CSXT's primary focus for chlorine traffic, CSXT pricing reflected primarily market conditions ")

⁸ *Id* at 7

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lead to the conclusion that there are no competitive market pressures that deter CSXT from charging monopoly prices for transporting chlorine. This means that CSXT possesses market dominance over chlorine transportation, and thus it is up to the Board to ensure that CSXT's rates are reasonable. 49 U.S.C. 10701(d)(1)

A. The Natrium Movement.

CSXT directs the vast majority of its market dominance argument at the Natrium Movement because that is the only chlorine movement at issue with an intermodal option. CSXT contends that, because barge handles 90% of the chlorine volume from Natrium to New Johnsonville, that conclusively establishes a lack of market dominance. But, CSXT completely misses the point of the very case law it cites.

CSXT quotes *Amstar Corp. v. Alabama Great S. R.R.*, 1987 WL 99849, at *4 (Nov. 10, 1987), for the proposition that, where there is an intermodal option between the origin and destination, "a complainant has a heavy burden to establish such a lack of bargaining power that there is no effective competition." CSXT Reply Ev. at 4. In this case, however, DuPont has presented un rebutted evidence that CSXT declared its chlorine rates to be "non-negotiable." See Pileggi Op. V.S. at ¶12. It is hard to imagine any stronger evidence that DuPont lacks bargaining power. Because DuPont made a *prima facie* showing, CSXT had the burden of going forward. See *McGraw Edison Co. v. The Alton and Southern Ry. Co.*, 21 C.C.2d 102, 106 (1986). Since CSXT did not deny or offer any explanation of its statement to DuPont, the Board must accept that DuPont lacks bargaining power, despite a barge alternative for the Natrium Movement.

CSXT erroneously cites to *Salt River Project Agricultural Improvement and Power District*, 762 F.2d 1053 (D.C. Cir. 1985) ("*Salt River*"), for the proposition that the mere presence of an alternative that accounts for a large percentage of actual volume is enough to

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preclude market dominance even in the face of evidence that a rail carrier's rates are not constrained by that alternative CSXT Reply Ev at 5-6 But that is not what the court held

More recently, in *CF Industries, Inc v STB*, 255 F 3d 816, 823, n. 6 (D C Cir 2001), the D C Circuit explained that its *Salt River* decision did not remove the requirement that competition be effective

Although we affirmed an ICC finding of lack of market dominance even though the alternatives "may not [have] exerted effective market pressure" on the defendant railroad's rates, we did so because the complainant shipper used the railroad "only under exceptional and unpredictable circumstances " 762 F 2d at 1064 & n 14. We concluded that in enacting the market dominance inquiry of 49 U.S.C § 10707, Congress did not intend to include a situation in which a carrier had only "transitory market power" over a shipper *Id* at 1062

CSXT erroneously equates its 10% share of the DuPont chlorine volume from Natrium to New Johnsonville with the "exceptional and unpredictable" rail movements of fuel oil in *Salt River* In *Salt River*, however, years often passed between fuel oil movements on the defendant railroad *Salt River*. 762 F 2d at 1063 & n 11 Because the Court was "unable to find reliable record evidence suggesting that Southern Pacific [would] ever participate in that market on anything other than an irregular and short-term basis[.] that prevent[ed] Salt River from showing that Southern Pacific is market dominant " *Id* at n 11.

In contrast, CSXT regularly and routinely transports chlorine from Natrium to New Johnsonville The fact that it does so in lesser quantities than barge does not render the rail movements "irregular," "short-term," "exceptional" or "unpredictable " Nor can CSXT's exertion of market power be characterized as "transitory " DuPont has explained that, for safety reasons, it transports as much chlorine from Natrium to New Johnsonville by barge as there is capacity to

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do so⁹ DuPont Op Ev at 13-14. But there will always be regular amounts of chlorine shipped by rail to New Johnsonville, because both rail and barge are required to ensure that DuPont has sufficient chlorine available to meet its needs Moore Reb V S at ¶¶5, 8 The rail volumes tendered by DuPont clearly are not insignificant or transitory¹⁰ Consequently, any time that DuPont tenders this steady volume of chlorine by rail, there is no alternative to CSXT Thus, the presence of barge competition for the Natrium Movement must be evaluated in terms of its effectiveness, notwithstanding CSXT's selective quotes from *Salt River* to the contrary

CSXT also challenges the DuPont claim that there is insufficient barge capacity to handle all chlorine transportation from Natrium to New Johnsonville CSXT Reply Ev at 7-8 In order to assert this challenge, however, CSXT selectively misquotes a DuPont document

[REDACTED]

Id at 8 quoting CSXT Reply Ex 6 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Furthermore, even if it were possible, that still leaves other

⁹ CSXT's citation to *Aluminum Ass'n, Inc v The Akron Canton & Youngstown R R Co*, 367 I C C 475, 484 (1983) for the proposition that a competing mode does not have to be capable of handling all of the subject traffic to be effective competition completely misses the point made by DuPont CSXT Reply Ev at 7 In this case, barges do not compete with rail because, as long as there is sufficient barge capacity, DuPont would not ship more chlorine by rail even if CSXT were to offer lower rates than barges, since barges are inherently safer See Pileggi Op V S at ¶9

¹⁰ In 2006 and 2007, DuPont tendered [REDACTED] cars of chlorine, respectively, from Natrium to New Johnsonville Pileggi Reb V S at ¶7

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unresolved capacity issues, such as water levels, ice, and damaged locks. *See* DuPont Op. Ev at 14

Although a railroad's low market share of the issue traffic normally would be strong evidence that it lacks market dominance, the Natrium Movement is not a "normal" situation even by CSXT's own admission. CSXT concedes that its pricing of chlorine no longer reflects "primarily market considerations." CSXT Op. Ev at 23. CSXT also describes the transportation of chlorine as "a legally-imposed burden that CSXT would greatly prefer to avoid," as opposed to "commercial business opportunities that CSXT attempts to win in a competitive marketplace." *Id.* at 7. The Board has never been asked to make a market dominance determination in a case where the rail carrier has so openly conceded that it sets rates for the issue movement outside of the competitive marketplace. Such a candid admission that competition has no effect upon CSXT's rates requires a finding that CSXT possesses market dominance.

B. The Niagara Falls Movement.

CSXT contends that it is not market dominant over the Niagara Falls Movement because there is geographic competition from the Natrium Movement, since both are chlorine movements to DuPont at New Johnsonville. CSXT Reply Ev at 8-9. The Board should reject CSXT's argument because (1) the Board has eliminated geographic competition as a factor in market dominance determinations, and (2) the evidence does not support a finding of geographic competition.

As a threshold matter, if CSXT does not possess market dominance over the Natrium Movement, it cannot possess market dominance over the Niagara Falls Movement. That is true because CSXT relies solely upon the presence of barge competition for the Natrium Movement to argue for a finding of geographic competition on the Niagara Falls Movement. Thus, if the

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Board concludes that barges do not create effective intermodal competition for the Natrium Movement, the Natrium Movement cannot provide effective geographic competition for the Niagara Falls Movement

CSXT's argument that the Board should consider evidence of geographic competition in this case is predicated upon incorrect facts and faulty logic. CSXT wrongly contends that the Board should permit evidence of geographic competition in this case because "source competition is apparent from the face of the record, and addressing it does not require *any* discovery—let alone the burdensome discovery that motivated the Board's decision in *Market Dominance Determinations – Product and Geographic Competition*, 3 S T B 937, n 49 (1988) " CSXT Reply Ev at 9 [emphasis in original]. To reach this conclusion, however, CSXT relies upon the very same document, indeed the very same phrase, that it misquoted to argue that DuPont can obtain more barge capacity from Natrium to New Johnsonville. CSXT then assumes that this additional barge capacity will enable DuPont to obtain additional chlorine from Natrium to replace the volumes that currently come from Niagara Falls, but without offering any evidence that Natrium has the available production capacity. Thus, it is clear that this single document falls far short of proving the existence of effective geographic competition.

Furthermore, when the Board did accept evidence of geographic competition, the burden of proof was on the rail carrier. CSXT cannot shift its burden to DuPont by claiming that "DuPont has not demonstrated that Natrium is not an option for it to obtain all of its chlorine needs from New Johnsonville," *id* , when DuPont is not required to make such a showing and had no reason to do so precisely because geographic competition is not a factor in market dominance determinations.

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Finally, even if DuPont can purchase additional chlorine at Natrium, that alone does not establish the existence of geographic competition. Geographic competition requires that "the complaining shipper can avoid using the defendant railroad by obtaining the same product from a different source..." *Market Dominance*, 3 S T B at 937 [emphasis added]. Since DuPont has demonstrated above that it already uses all the available barge capacity from Natrium to New Johnsonville, any additional chlorine purchased from Natrium must move by rail. Therefore, DuPont cannot avoid using CSXT by purchasing chlorine from Natrium rather than Niagara Falls, which means that geographic competition does not exist.

III. CSXT HAS NOT FOLLOWED THE BOARD-MANDATED PROCEDURES FOR CALCULATING VARIABLE COSTS

As DuPont explained on page 14 of its Reply Evidence, CSX I' has not followed the Board's prescribed procedures for calculating variable costs. The proper calculation of variable costs is important because the maximum reasonable rate is the product of the adjusted average R/VC ratio for the comparison group multiplied by the variable cost of the issue movement.

The loaded mileage inputs for calculating the URCS variable costs of movements in the Waybill Sample are generated from the PC*Miler|Rail program. Crowley Reply V S at 5-6. Therefore, DuPont has used the same source to identify the loaded miles for the issue movements. In contrast, CSXT has used loaded miles from its internal records for the issue movements, which accounts for nearly the entire difference in the party's variable cost calculations.

But, it would be inconsistent to use CSX I's internal records for the issue movements while continuing to rely upon the PC*Miler|Rail program for all of the comparison movements. Indeed, all three of the small case benchmarks are calculated from the Waybill Sample, including

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the loaded miles generated from the PC*Miler[Rail] program ¹¹ Therefore, the maximum R/VC ratio generated by those benchmarks should be applied to variable costs based upon the same data source

IV. THE DUPONT "FINAL OFFER" COMPARISON GROUPS ARE THE MOST SIMILAR TO THE ISSUE MOVEMENTS.

The "final offer" comparison groups presented by DuPont and CSXT for the issue movements are distinguished by just three factors ¹² First, while DuPont has included all TIH commodities in its comparison groups, CSXT has included only the issue commodity, chlorine. Second, CSXT has excluded all movements with no amount in the "Miscellaneous Charges" field of the Waybill Sample on the unsupported assumption that fuel costs were not recovered for such movements Third, although the parties have agreed upon the distance criteria for comparison movements, they have applied that criteria to different loaded miles. DuPont Witness Crowley has compared the movements in each party's "final offer" comparison groups and identified the reasons why each has excluded certain movements that the other has included Crowley Reb V S at 5-6, Exs TDC-21, 22 & 23 DuPont believes that its "final offer" comparison groups for each of the issue movements are the "most similar in the aggregate to the issue movements " *Simplified Standards* at 18

A. DuPont Has Properly Included TIH Commodities In Its Comparison Groups.

DuPont has selected all TIH commodities for its comparison groups based upon CSXT's own representations that it treats all such commodities the same [REDACTED]

¹¹ See Part IV C , *infra*, for a more detailed discussion of the role of the PC*Miler[Rail] program to select movements of comparable distances

¹² A fourth factor also distinguishes the Natrium and Carney's Point Movements Specifically, although the parties have agreed to exclude the issue movements from their comparison groups, CSXT has identified any occurrence of the issue movement for one lane as an issue movement for all three lanes See DuPont Reply Ev at 20-21 However, for each such movement excluded by CSXT, CSXT has identified a second independent reason for excluding that movement Thus, DuPont has not addressed it as a distinctly separate factor

[REDACTED]

[REDACTED] Consistent with those sentiments, in this case CSXT has stated that all factors other than risk "fade to near irrelevance when it comes to moving" chlorine. CSXT Op. Ev. at 6. Furthermore, CSXT has publicly acknowledged that "Given a choice, CSXT would decline to transport [TIH commodities]." DuPont Op. Ev. at 12. Because CSXT is treating all TIH commodities as if they have a demand elasticity of zero, with CSXT's risk being the principle driver of rates, DuPont has reasonably included all TIH commodities in its comparison groups for the issue movements.¹³

CSXT's argument for excluding other TIH commodities from its comparison group exposes the bipolar nature of its position in this case. Despite the above-quoted statements, CSXT asserts that, "The fact that a commodity is labeled a TIH says nothing about the commercial uses of the product, the value of the product, its market, demand for that product relative to other products, shippers' (or receivers') elasticity of demand for transportation of the commodity, or any other commercial marketplace determinant of transportation rates." CSXT Reply Ev. at 15. CSXT cannot claim that these factors are important determinants of rail rates for TIH commodities in one breath, and in the next claim that they "fade to near irrelevance" compared to the overriding common factor of risk. If, as CSXT claims, risk is the overriding factor in pricing chlorine movements and chlorine shares the same risk characteristics as other TIH commodities, then CSXT's pricing of other TIH commodities is a relevant comparison factor.

¹³ CSXT wrongly states that DuPont has claimed that all TIH commodities have a demand elasticity of zero. CSXT Reply Ev. at 15, n. 14. To be accurate, DuPont stated that CSXT treats all TIH commodities as if they have a demand elasticity of zero. DuPont Op. Ev. at 20. Because CSXT ignores the actual demand elasticity of TIH commodities in setting rates, the Board should do the same in selecting the best comparison group.

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Even if it is appropriate to give some consideration to the less influential "non-risk" factors, there still is no basis for excluding other TIH commodities from the comparison groups. Although CSXT says very little about why most other TIH commodities are not similar to chlorine, it does present a more extensive discussion of anhydrous ammonia, which is the principle non-chlorine TIH commodity included in the DuPont comparison groups.¹⁴ As evidence of the alleged disparity between chlorine and anhydrous ammonia, CSXT claims that it "does not even include them in the same business groups for marketing purposes: chlorine is marketed and managed by the Chemicals marketing department, and anhydrous ammonia is the responsibility of CSXT's Phosphates and Fertilizers marketing department." CSXT Reply Ev. at 17. DuPont finds it highly ironic that CSXT's principle witness on this subject, Dean Piacente, bears the title of "Vice-President – Chemicals *and* Fertilizer." Piacente Reply V.S. at ¶1 [emphasis added].

CSXT also contends that "there are significantly more viable transportation modes and distribution channels for anhydrous ammonia than for chlorine." CSXT Reply Ev. at 17. That fact, however, does not distinguish the two commodities for comparison purposes. Although anhydrous ammonia has the ability to move by pipeline and barge in some situations, DuPont has demonstrated that those modes are not competitors with rail. Rather, the evidence shows that rail transportation of anhydrous ammonia is restricted to movements beyond the reach or capacity of those modes. DuPont Reply Ev. at 26, citing *CF Industries, Inc. v. Koch Pipeline Co., L.P.*, 4

¹⁴ CSXT contends that DuPont omitted two TIH commodities, Chloropicrin (STCC 2818830) and Nitric Acid (2819215), from its comparison group. CSXT Reply Ev. at 15, n. 13. This was an oversight rather than an intentional omission by DuPont. Furthermore, this oversight had the *de minimis* effect of omitting only one movement from the Niagara Falls Movement comparison group of 28, four movements from the Natrium Movement comparison group of 99, and three movements from the Carney's Point Movement comparison group of 169. Crowley Reb. V.S. at 10.

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S T B 637 (2000) This in fact is very similar to chlorine, which will always move by barge even when rail is an option *Id*

Although some anhydrous ammonia also moves by truck, Mr Piacente's claim that trucks can be competitive with rail transportation of anhydrous ammonia for up to 1000 miles should be extremely troubling, if true See Piacente Reply V S at ¶15 and CSXT Reply Ex 5. In the *Koch Pipeline* decision, the Board observed that.

Because AA may be transported only in specialized refrigeration or pressurization equipment by highly trained drivers, truck transportation of AA is typically limited to short-haul movements from storage terminals to nearby retailers . To truck AA shipments from several hundred to, in some cases, more than 1,000 miles—even if enough specialized trucks were available—would be prohibitively expensive and present substantial safety risks.

4 S T B at 644 [footnote omitted] In contrast to this evidence, Mr Piacente predicates his claim that trucks can be competitive with rail for up to 1000 miles solely on a marketing brochure from a single truck company that proclaims "Trucks can be competitive with rail transportation up to 1,000 miles Right Now!" CSXT Reply Ex 5 At best, this proves that CSXT's demarketing efforts have increased current rail rates for anhydrous ammonia so much, just like chlorine rates, that even trucks can compete at much longer distances than historically have been practical If this is true, this poses substantial public interest concerns that the "demarketing" of T1H commodities by the rail industry is pushing those commodities with a truck option off the rails and onto our nation's highways, which the Board has noted "would present substantial safety risks "

Moreover, if CSXT is pricing anhydrous ammonia transportation as if trucks were not an option, that is no different from its pricing of chlorine where truck is never an option This is

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further evidence that DuPont has reasonably included anhydrous ammonia, along with other TIH commodities, in its comparison groups

B. CSXT's Fuel Surcharge Criteria Is Based Upon A Methodology That The Board Declared To Be An Unreasonable Practice.

CSXT unreasonably assumes that all movements with no amount in the "Miscellaneous Charges" field of the Waybill Sample should be excluded from the comparison groups because they did not recover their fuel costs. DuPont has challenged that assumption because CSXT has not demonstrated that it records all fuel surcharges in the "Miscellaneous Charges" field and because there are means other than fuel surcharges to recover fuel costs. DuPont Reply Ev. at 27-28

However, one factor rises above all others to rebut CSXT's position. By its own admission, from 2002-2005, CSXT was over-recovering fuel costs on traffic that was subject to a fuel surcharge as a means to recover its overall fuel expenses, effectively cross-subsidizing traffic that was not subject to a fuel surcharge. See DuPont Reply Ev. at 28-29. The Board rejected that fuel surcharge methodology as an unreasonable practice because "there is no real correlation between the rate increase and the increase in fuel costs for that particular movement to which the surcharge is applied." *Rail Fuel Surcharges*, STB Ex Parte No. 661, slip op. at 7 (served Jan. 26, 2007).

Based upon the Board's holding, movements with a fuel surcharge (assuming that is what the "Miscellaneous Charge" field represents) should be excluded from the comparison groups because they would overstate the maximum reasonable R/VC ratio. However, if the Board were to exclude movements with a fuel surcharge for overstating cost recovery, and exclude movements without a fuel surcharge for understating cost recovery, there would be no movements left from which to select a comparison group.

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A reasonable approach is to include movements in the comparison group, without any regard to the "Miscellaneous Charges" field. This would permit CSX I's conceded over-recovery of fuel costs for the one category of movements to offset its alleged under-recovery on the other. The average R/VC ratio of the combined categories would be most similar to what it would have been if CSXT had properly accounted for fuel in both categories of movements in the first place. Because the DuPont comparison groups do this and CSXT's do not, DuPont has taken a reasonable approach, whereas CSXT has not.

C. DuPont Has Used the Only Source for Length Haul Permitted by *Simplified Standards*.

In its "final offer" comparison group, CSX I has adopted the DuPont distance criteria, but with two exceptions, one of which violates *Simplified Standards*. DuPont rounded the issue movement mileage, as provided in the Waybill Sample by the PC*Miller[Rail] program, to the nearest 50 miles and selected movements that fell within a range of 150 miles on either side of that number. Although CSXT has accepted the +/-150 mile range applied by DuPont, it has applied that range to the loaded miles in its internal records rather than the loaded miles in the Waybill Sample. In addition, CSXT has not rounded the issue movement mileage from its internal records.

The fatal flaw in CSXT's approach is its use of loaded miles from its internal records. In *Simplified Standards* at page 83, the Board clearly and unequivocally stated that it "will select the comparison group based on information contained in the Waybill Sample released to the parties at the outset of the case and other publicly available information." The mileage distances used by CSXT for the issue movements are not from the Waybill Sample or publicly available.

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information, and therefore cannot be used to identify comparable movements¹⁵ Thus, DuPont has applied the 150-mile range adopted by both parties to the issue movement mileages obtained from the Waybill Sample, which is the only permissible source.

In addition to being legally improper, it is analytically improper to use CSXT's internal records to calculate the distance of the issue movement while relying upon the Waybill Sample for the distance of the comparable movements In order to make appropriate comparisons, the distances of the issue movements and the comparison movements should be drawn from the same data source, the PC*Miler|Rail program, which applies the same methodology to calculate the loaded miles for all movements in the Waybill Sample

Lastly, CSXT has not adopted the convenient rounding technique employed by DuPont Although CSXT attempts to portray this as creating a huge discrepancy, the reality is much different DuPont Witness Crowley has calculated the impact upon the DuPont "final offer" comparison groups of rounding the issue movement miles to the nearest 50 miles versus not rounding at all. *See Crowley Reb V S. at 14-15 & Ex TDC-24* The revised comparison group for the Niagara Falls Movement causes a change in the maximum R/VC ratio from 290% to 297%, an increase of only 2.4% The revised comparison group for the Natrium Movement causes a change in the maximum R/VC ratio from 330% to 331%, an increase of only 0.3%. The revised comparison group for the Carney's Point Movement causes a change in the maximum R/VC ratio from 326% to 321%, a decrease of 1.5% Clearly, the fact that DuPont rounded the issue miles for convenience does not detract from the reasonableness of its comparison groups

¹⁵ The mileage distances for the issue movements in the Waybill Sample are different from CSXT's internal records for two of the three issue movements CSXT has accepted the DuPont miles for the Niagara Falls Movement

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D. DuPont has Selected the Most Reasonable Comparison Groups.

The Board will select the comparison group that it determines "is most similar in the aggregate to the issue movements." *Simplified Standards* at 18 "The selection of the best comparison group will be governed by which group the Board concludes provides the best evidence as to the reasonable level of contribution to joint and common costs for the issue movement " *Id* In the aggregate, DuPont has submitted the most reasonable comparison group for each of the three issue movements

Although DuPont includes other TIH commodities in its comparison groups, it has reasonably relied upon CSXT's own statements, both public and private, that CSXT prices all TIH commodities based upon risk, without regard for traditional market-based factors Moreover, DuPont also has demonstrated that chlorine and anhydrous ammonia have comparable transportation market characteristics Thus, although CSXT's comparison commodity group is narrower, the inclusion of other TIH commodities by DuPont is both justified and reasonable ¹⁶

Both parties have applied the same distance criteria of +/-150 miles around the issue movement miles However, because CSXT has used a prohibited data source for the issue movement miles, its application of the distance criteria is *de facto* unreasonable

By far, the most significant factor in this case is CSXT's unreasonable application of a fuel surcharge criteria CSXT has excluded all movements without an amount in the "Miscellaneous Charges" field of the Waybill Sample on the unproven assumption that fuel costs were not recovered on those movements Moreover, even if the Board accepts this assumption as true, CSXT's comparison group consists of only movements to which CSXT applied a fuel surcharge methodology that the Board has determined to be an unreasonable practice, because

¹⁶ Another concern is that, when CSXT applies its other criteria on top of its commodity restriction, the comparison group for the Niagara Falls Movement consists of only seven movements This is 75% smaller than the DuPont comparison group and raises serious questions as to the statistical significance of the result

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that methodology over-recovers actual changes in fuel costs for individual movements

Consequently, CSXT's comparison group overstates "the reasonable level of contribution to joint and common costs." *Id*

In summary, DuPont has selected the most reasonable comparison groups in the aggregate, based upon the three differences between the "final offer" comparison groups selected by each party. Although CSXT's group is narrower, both DuPont and CSXT have identified a reasonable group of comparable commodities. In addition, both have applied the same mileage criteria. But, because CSXT applied the criteria to mileage derived from a prohibited data source, only DuPont has applied the criteria reasonably. Most significantly, CSXT's fuel surcharge criteria causes its comparison group to overstate the reasonable level of contribution to joint and common costs. By not including a fuel surcharge criteria, DuPont has reasonably selected a comparison group where the average R/VC ratio of movements both with and without a fuel surcharge is a much more accurate reflection of a reasonable level of contribution to joint and common costs. Thus, DuPont clearly has selected the most reasonable groups that are similar in the aggregate to the issue movements.

VI. "OTHER RELEVANT FACTORS"

Both CSXT and DuPont have proposed two adjustments each to the maximum reasonable R/VC ratios of their comparison groups to account for "other relevant factors."¹⁷ DuPont has recalculated the RSAM and R/VC>180 benchmarks to reflect the Board's newly-adopted cost-of-capital methodology for all four years of the Waybill Sample, and it has calculated an efficiency-adjusted RSAM. CSXT has adjusted the RSAM for an alleged need to account for taxes in the revenue-shortfall, and it claims that it is necessary to index the costs and revenues of its

¹⁷ Although CSXT does not describe its adjustments as "other relevant factors," the DuPont critique remains the same.

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comparison group to 2007 levels CSXI's adjustments are inappropriate, unnecessary, and inherently biased In contrast, the DuPont adjustments are reasonably and objectively tailored to reflect the Board's most current and precise cost-of-capital methodology and to eliminate inefficient pricing from CSXI's RSAM benchmark

A. DuPont Has Offered A Reasonable, Objective And Transparent Means To Apply The CAPM Methodology.

In its Opening Evidence at 24-25, DuPont adjusted the Board's RSAM and R/VC>180 figures by calculating the cost of capital underlying those benchmarks in accordance with the Capital Asset Pricing Model ("CAPM") weighted average cost of capital ("WACC") methodology adopted in *Methodology to be Employed in Determining the Railroad Industry's Cost of Capital*, STB Ex Parte No 558 (Sub-No 10), slip op at 1, (served Jan 17, 2008) ("*Changed Cost of Capital Methodology*"), which the Board described as employing "more current and precise techniques " Because Congress has directed the Board to "ensure the availability of accurate cost information in regulatory proceedings," 49 U.S.C. 10101(14), DuPont argued that the Board is legally obligated to make these adjustments In the alternative, DuPont argued that the Board should make these adjustments as part of its consideration of "other relevant factors " DuPont Op Ev at 26

1. The Board is legally required to recalculate the RSAM and R/VC>180 benchmarks using the CAPM methodology.⁵

CSXI inappropriately relies upon *Edison Elec Institute v ICC*, 969 F.2d 1221 (D.C. Cir 1992) ("*EEL*"), and *Alabama Power Co v ICC*, 852 F.2d 1361 (D.C. Cir 1988) ("*Alabama Power*"), to claim that the Board is not legally obligated to use the CAPM WACC methodology to recalculate the RSAM and R/VC >180 benchmarks CSXI Rep. Ev at 29-30 Neither decision stands for the blanket proposition that the Board is never required to apply a new methodology retroactively Rather, in both decisions, the Court affirmed ICC decisions not to

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apply changes to the RCAF retroactively because the ICC had reasonably interpreted the statute in light of the facts before it. Both decisions and their facts are distinguishable from this case.

In *EEI*, the Court affirmed the ICC's decision not to apply the newly-adopted RCAF-A retroactively based upon the concerns cited by the agency

In deciding not to restate the RCAF, the ICC cited four concerns (1) a railroad might be made "financially liable for rate actions that were protected when they were taken", (2) data limitations make it difficult to calculate accurately productivity gains made prior to 1986, (3) there is a lack of evidence that present rates are unreasonably high, and (4) restatement would have an "unknowable but potentially substantial" impact upon railroads' earnings *Productivity Adjustment*, 5 I C C 2d at 470-71

EEI at 1227-28 The Court held that it was reasonable for the ICC "to preserve settled expectations" expressed in the first concern, and to avoid the speculation required by the second concern *Id* at 1228 Because those reasons were sufficient to affirm the agency, the Court did not address the other two concerns *Id*

None of those concerns are present in this case First, CSXT has not expressed any settled expectations in the current RSAM or R/VC > 180, nor could it since they were first published only three months ago Second, there are no data limitations to revising the RSAM or R/VC > 180 to reflect the CAPM WACC methodology *Crowley Reb V S* at 21 Third the precise issue in this case is whether CSXT's current rates are unreasonably high, and accurate RSAM and R/VC > 180 benchmarks are essential to making that determination By contrast, in *EEI*, the ICC's concern was with the effect of applying the RCAF-A to past rates Finally, restatement of the RSAM and R/VC > 180 will not have the substantial impact upon railroad earnings that concerned the Board in *EEI* precisely because these restatements will not affect past rates

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In *Alabama Power*, 852 F.2d at 1370-72, the Court affirmed the ICC's decision not to make a full retroactive adjustment to the RCAF index to correct a forecast error that dated back to the inception of the RCAF. Although the Court observed that the Petitioners' argument for retroactive adjustment had "some force," *id.* at 1371, it ultimately affirmed the agency because it had engaged in a reasonable balancing of the equities by concluding that the harm to railroads outweighed the harm to shippers. *Id.* In this case, however, the equities clearly favor DuPont because the Board's more precise CAPM WACC methodology protects DuPont from paying unreasonably high rates that otherwise would be considered reasonable under the former, and less precise, cost of capital methodology that the Board itself acknowledged has "fallen into disfavor." *Changed Cost of Capital Methodology*, at 5. In contrast, CSXT has no settled expectations based upon the current RSAM and R/V<180 calculations.

2. The Board is permitted to adjust prior year RSAM and R/V<180 figures by CAPM.

CSXT incorrectly claims that use of the CAPM WACC methodology to recalculate past RSAM and R/V<180 figures would be an impermissible retroactive application of a new rule. CSXT Reply Ev. at 30-31, citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 207 (1988). The retroactive rulemaking referred to in *Bowen*, however, concerned the application of a new rule to vested rights under the previous state of the law. *Id.* (the court rejected an attempt to apply a new rule retroactively to recoup monies paid out under the old rule). In contrast, CSXT has no vested rights based upon either the prior RSAM or cost-of-capital calculations. The D.C. Circuit has distinguished *Bowen* on this very basis, holding that "[a] law is 'retroactive' if it 'takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.'" *Assoc. of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992).

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quoting Neild v Dist of Columbia, 110 F 2d 246, 254 (D C Cir 1940) Because none of these things result from using the CAPM WACC methodology to recalculate past RSAM and R/VC>180 benchmarks, such action would not constitute retroactive rulemaking

Furthermore, what CSXT claims the Board cannot do to the RSAM and R/VC>180 figures, the Board in fact already has done The Board adopted a new RSAM methodology in *Simplified Standards*, which it subsequently applied retroactively to the years 2002 to 2005, even though the Board previously had calculated the RSAM for those years under a different methodology Compare the decisions served on Dec 20, 2007 and April 25, 2006 in *Rate Guidelines—Non-Coal Proceedings*, STB Ex Parte No 347 (Sub-No 2) What DuPont seeks is much less intrusive because it does not seek to change the RSAM methodology at all Rather, DuPont asks the Board to update its cost-of-capital input to the RSAM methodology, by using the most current and precise cost of capital

Contrary to CSXT's claims, this would not "disrupt settled expectations and business conduct and commercial decisions made several years ago in reliance on the Board's published RSAM figures " CSXT Reply Ev at 30 The RSAM figures that DuPont seeks to update were published only three months ago

CSXT's assertion that the Board would have to reopen settled decisions, if it applies the CAPM WACC methodology in this case, is absolutely wrong CSXT Reply Ev at 31, n 29 Whereas a settled decision is administratively final, this case is not DuPont asks only that the Board apply its most current and precise standards to determine the reasonableness of CSXT's rates in this pending case The Board is under no obligation to reopen settled, administratively final decisions that applied the old cost of capital methodology in place at the time those cases were decided. See *United States v Estate of Donnelly*, 397 U S 286, 295-97 (1970) (Harlan, J ,

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concurring) (In the civil area, a new decisional rule should not apply retroactively "when the transaction is beyond challenge because the rights of the parties have been fixed by litigation and have become res judicata"), *quoted in, American Trucking Associations, Inc v Smith*, 496 U.S. 167, 214-15 (1990) (Stevens, J, *dissenting*) (although dissenting in the result, this was the majority opinion on the issue of retroactivity, *see id* at 201 (Scalia, J *concurring in judgment*))

3. Implementation of CAPM does not constitute an impermissible adjustment to URCS.

CSXT attempts to avoid application of the CAPM WACC methodology by calling it an impermissible adjustment to URCS CSXT Reply Ev. at 38 But that is not what the Board meant when it declared its intention to use only unadjusted URCS to calculate the variable cost of the issue and comparison group movements The Board was addressing requests to make "movement-specific" adjustments to URCS to substitute the cost of handling a specific movement for the system average cost used by URCS *Simplified Standards* at 84, *See also, Major Issues in Rail Rate Cases*, STB Ex Parte No 657 (Sub-No 1), slip op at 48 (served Oct 30, 2006) (movement-specific adjustments are "the use of variable cost units different from the URCS system-wide average figure ") The application of CAPM WACC is not a movement-specific adjustment, it is a "technical correction" to an URCS input that is uniformly applied to the calculation of the URCS variable cost for all movements

4. DuPont has conservatively understated the effect of applying the CAPM approach.

CSXT contends that the Board cannot apply the CAPM WACC methodology in this case because multiple other variables and calculations would be affected by a switch to CAPM WACC, for which DuPont has not made any adjustments CSXT Reply Ev at 34-37 These are the recalculation of variable costs for both the issue and comparison traffic, the re-identification of traffic in the Waybill Sample with an R/VC>180, and the re-selection of a comparable group

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from this revised R/VC>180 traffic. As CSXT¹ correctly observes, however, this "would require use of data and information the Board has held inadmissible for purposes of selecting comparison groups " *Id* at 37. For that reason, DuPont did not calculate the impact of the CAPM WACC upon all of these other variables. But, by making only the changes that it presented in its Opening and Reply Evidence, DuPont took a conservative approach that produces a higher maximum reasonable rate than a full approach would have produced.

Although CSXT¹ correctly notes that the CAPM WACC may cause the R/VC ratios of the comparison groups to increase, *id* at 35, CSXT¹ neglects to mention the countervailing effects of reducing the variable cost of the issue movements and increasing the amount of traffic with an R/VC >180. The net effect of these changes inevitably produces a lower maximum reasonable rate than applying just the adjustments that DuPont has made.

To demonstrate this fact, DuPont witness Crowley has shown the other effects of switching to the CAPM WACC and how they flow through to determine the maximum reasonable rates for the issue movements. Crowley Reb. V S. at 22, Ex. 17DC-27. In the DuPont Opening and Reply Evidence, Mr. Crowley only adjusted the CSXT RSAM and R/VC>180 benchmarks by re-costing the 2002-2005 Waybill Sample data to include the CAPM WACC. Now, in order to show the CAPM WACC impact upon the other variables identified by CSXT¹, Mr. Crowley has taken the additional steps of using the CAPM WACC to recalculate the issue movement variable costs and revising the comparison group by applying the DuPont "final offer" selection criteria to the revised universe of R/VC>180 traffic in the Waybill Sample.

For the Niagara Falls Movement, the DuPont Reply Evidence, adjusted for the CAPM WACC, produced a maximum R/VC of 269% and a maximum rate of \$5361.84. The restated

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CAPM WACC procedure actually produces a lower maximum R/VC ratio of 266%¹⁸ and a lower issue movement variable cost, which results in a lower maximum rate of \$5,056.87. Crowley Reb. V S., Ex. TDC-27.

For the Natrium Movement, the DuPont Reply Evidence, adjusted for CAPM WACC, produced a maximum R/VC of 306% and a maximum rate of \$5,240.31. The restated CAPM WACC procedure produces a slightly higher maximum R/VC ratio of 307% that, when applied to a lower issue movement variable cost, results in a lower maximum rate of \$5,020.83. *Id.*

For the Carney's Point Movement, the DuPont Reply Evidence, adjusted for the CAPM WACC, produced a maximum R/VC of 303% and a maximum rate of \$4,462.13. The restated CAPM WACC procedure produces a higher maximum R/VC ratio of 313% that, when applied to a lower issue movement variable cost, results in a lower maximum rate of \$4,408.51. *Id.*

This proves that CSXT's critique of the DuPont application of the CAPM WACC methodology is a red-herring. The additional steps that DuPont did not take, because *Simplified Standards* would not permit them, would produce a lower maximum reasonable rate. DuPont is not asking the Board to prescribe that rate, but has introduced this information solely in response to CSXT's charge that DuPont did not take these steps for result-oriented reasons. CSX I Reply Ev. at 36, n. 34.

B. DuPont Has Properly Applied An Efficiency Adjustment to the RSAM.

In its Opening Evidence at 26-28, DuPont argued that the Board must apply an "efficiency adjusted" RSAM in order to satisfy its statutory obligation to consider the Long-Cannon factors. The efficiency adjusted RSAM eliminates traffic being carried at less than long-run variable cost. Because there no longer is significant excess capacity in the rail industry,

¹⁸ The decrease is due to the addition of movements to the comparison group that previously were below a R/VC ratio of 180%, but now exceed 180% with the use of the CAPM WACC. Crowley Reb. V S. at 22, n. 6.

PUBLIC VERSION

DuPont argued that today, more than ever before, there is no reason for rail carriers to be transporting commodities at less than long-run variable cost

CSXT contends that the Board should reject an efficiency-adjusted RSAM as an "other relevant factor" because the Board eliminated the RSAM "range" concept in *Simplified Standards* after no party objected to its proposal. CSXT Reply Ev. at 40-41 It is misleading to claim that no party objected to elimination of the efficiency-adjusted RSAM in *Simplified Standards* The Board in fact proposed a new methodology for calculating the RSAM that was very different from its prior methodology, which had included the RSAM range *Simplified Standards* (decision served July 28, 2006), pp 22-24 No party objected to elimination of the RSAM range as to that methodology. However, in the final *Simplified Standards* decision, at pp 19-20, the Board decided not to adopt that methodology, but instead adopted an entirely different methodology from any that it, or any commenting party, had proposed. The Board never offered any party an opportunity to object to elimination of the RSAM range as to the RSAM methodology that it ultimately adopted

Although the Board recently rejected a petition for reconsideration of the efficiency-adjusted RSAM in *Simplified Standards* (decision served March 19, 2008), the Board did so on procedural, not substantive, grounds Moreover, the Board noted that the petitioners "ask for something we have already granted Under the Three-Benchmark method, parties may submit evidence of 'other relevant factors' to demonstrate that the maximum lawful rate should be higher or lower, such as evidence 'that the railroads are not operating as efficiently as possible ' *Simplified Standards* at 22 " *Id* , slip op. at 13 Thus, the Board has not foreclosed the evidence submitted by DuPont that CSXT is carrying traffic at less than long-run variable cost and that such traffic should be excluded from the RSAM benchmark

PUBLIC VERSION

C. The Board Should Reject CSXT's RSAM Adjustment.

CSXT has identified an alleged flaw in the Board's RSAM calculation that it attempts to correct CSXT Op Ev at 24-26 Because the RSAM revenue shortfall is calculated after all taxes have been paid, CSXT claims that the revenue needed to make up that shortfall also must be calculated after taxes in order for CSXT to achieve revenue adequacy There are two fundamental problems with CSXT's adjustment.

First, even if the Board accepts CSXT's contention that there is a flaw, CSXT erroneously applies its statutory tax rate, even though its effective tax rate was much lower in 2002-2005 DuPont Reply Ev. at 34-35. This causes CSXT to grossly overstate the amount of revenue required to pay taxes on the revenue shortfall Although the proper tax rate to consider is CSXT's marginal tax rate, that can only be determined from CSXT's actual tax returns, which CSXT has declined to put into evidence in this proceeding Therefore, CSXT's effective tax rate is the best and most reliable evidence

DuPont, however, does not accept CSXT's claim that any adjustment to the RSAM is required, because URCS overstates the tax component of variable costs by using the statutory tax rate. *Id* at 35-36 This has resulted in URCS including taxes for CSXT that are several times more than CSXT's actual tax expense. This overstates CSXT's variable costs, which reduces the Revenue^{>180} amount Thus, CSXT's revenue shortfall is already overstated

As this debate has demonstrated, there are a multitude of countervailing factors that must be considered before declaring the existence of a flaw in the RSAM methodology and precisely how to fix such a flaw Indeed, the Board received several rounds of comments in *Simplified Standards* without anyone identifying this alleged flaw Therefore, the Board should not determine the existence of a flaw within the narrow confines of this proceeding between just

PUBLIC VERSION

DuPont and CSXT Rather, the Board should apply the RSAM that it adopted after extensive public notice and comment and direct CSXT to raise the alleged flaw in a petition to reopen *Simplified Standards*

D. CSXT's "Market" Adjustment Is Neither Necessary Nor Appropriate.

CSXT wrongly attempts to adjust the revenues and costs of every comparison group movement to 2007 "market" levels because the challenged rates were first published in 2007 CSXT Op Ev at 26-29 DuPont has objected to CSXT's adjustments as unnecessary and inappropriate on three grounds

First, CSXT incorrectly assumes that the Board should evaluate rate reasonableness based upon a static period in time, *i.e.*, a specific calendar year But, from the earliest permutations of the Three-Benchmark approach, the Board has strived to follow a multi-year approach that smooths out market fluctuations over time Because a rate prescription is for a five year period, it is important to prescribe a rate that is based neither upon the peak nor the trough of the business cycle CSXT's "market" adjustments would undermine the Board's carefully considered decision to use a 4-year average of all three benchmarks in order to smooth out the impact of market fluctuations over time when comparing the R/VC ratios of the issue traffic with a comparison group DuPont Reply Ev at 37-39

Second, CSXT's adjustment methodology is far from objective *Id* at 39-41 CSXT has adjusted only the R/VC ratios of the comparison group benchmark, without accounting for the offsetting impact of those adjustments upon the RSAM and R/VC > 180 benchmarks What we are left with are comparison movement R/VC ratios that nominally have been indexed to 2007 price levels, and RSAM and R/VC > 180 ratios based on averages of 2002 to 2005 historic rates and costs This apples-to-oranges comparison would allow CSXT to apply a much higher R/VC

PUBLIC VERSION

ratio to DuPont than would be proper. The Board rejected a similar proposal in *Simplified Standards*, at pp. 84-85, and it should do so again in this case.

Third, CSXT has not demonstrated that its adjustments are necessary to reflect changes in the market. DuPont Reply Ev. at 41-42. CSXT's primary justification for its proposed adjustment is that total revenues for its chemical group as a whole have increased since 2002. CSXT's chemical group, however, covers a broad range of commodities, including sand, plastics, petroleum coke, LPG, soda ash and various TIH commodities, that have nothing in common other than being included in CSXT's chemical business group. CSXT has not attempted to attribute its increased revenues to a more narrow group that includes the issue commodities. Neither has CSXT attempted to segregate fuel surcharges from its increased revenue, which is a significant revenue factor that is independent of the chemical transportation market.

In order to show that indexing is not necessary, DuPont Witness Crowley has developed the range and average R/VC ratios of the DuPont "final offer" comparison groups for each year of the Waybill Sample from 2002 to 2005. Crowley Reb. V.S. at 17-18 and Ex. TDC-25. Although the R/VC ratios cover a wide range, the annual averages fall within a much narrower band. Furthermore, the average R/VC ratios are higher in the earlier years than in the later years. This validates the Board's conclusion in *Simplified Standards*, pp. 84-85, that no indexing of revenues or variable costs is necessary, since the R/VC ratios will reflect the annual changes in revenues and variable costs.

VII. CALCULATION OF MAXIMUM R/VC RATIOS

DuPont has calculated the maximum R/VC ratio for each issue movement in three ways. First, DuPont has applied the formula in *Simplified Standards* to each of its three "final offer" comparison groups. Second, DuPont has adjusted the result of the Board's formula, as described in its opening evidence, to account for the "Long-Cannon" factors in the statute. 49 U.S.C.

PUBLIC VERSION

10701(d)(2)(A)-(C) Third, DuPont has recalculated the RSAM and R/VC > 180 benchmarks, as described in its opening evidence, to apply the Board's most current and accurate methodology for calculating the cost of capital. DuPont has summarized these results in the chart below.

Maximum R/VC Ratios Based Upon DuPont "Final Offer" Comparison Groups			
	Niagara Falls Movement	Natrium Movement	Carnecys Point Movement
Maximum R/VC Ratio Based Upon <i>Simplified Standards</i> without "other relevant factors" ¹⁹	290%	330%	333%
Maximum R/VC Ratio Based Upon RSAM with efficiency adjustment ²⁰	272%	309%	306%
Maximum R/VC Ratio Based Upon New Cost of Capital Methodology ²¹	269%	306%	303%

VIII. CONCLUSION

DuPont respectfully requests the Board to

- (1) find that the CSXT's common carrier rates applicable to the transportation of the commodity between the origins and destinations named in the Complaint are unreasonable,
- (2) prescribe just and reasonable rates for the future applicable to the rail transportation of DuPont's traffic, pursuant to 49 U S C §§ 10704(a)(1) and 11701(a), and,
- (3) award DuPont reparations, plus applicable interest, in accordance with 49 U S C § 11704 for unlawful rates set by CSXT for the period beginning June 16, 2007 to the effective date of a decision by the Board prescribing just and reasonable rates

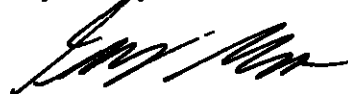
¹⁹ Crowley Reply V S at 31, Table 5

²⁰ Crowley Reply V S at 46, Table 6

²¹ Crowley Reply V S at 48, Table 7

PUBLIC VERSION

Respectfully submitted,



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Washington, D.C. 20036

*Attorneys for E I du Pont de Nemours and
Company*

April 4, 2008

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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E I DUPONT DE NEMOURS AND COMPANY)	
	Complainant,)	
)	
v)	Docket No NOR 42100
)	
CSX TRANSPORTATION, INC ,)	
	Defendant)	
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PART II – REBUTTAL VERIFIED STATEMENTS

- 1) Rebuttal Verified Statement of Mary Pilcgg, North American Region Logistics Manager, DuPont Logistics, Global Sourcing and Logistics
- 2) Rebuttal Verified Statement of Michelle Moore, an Executive Buyer of raw materials for E I du Pont de Nemours and Company
- 3) Rebuttal Verified Statement of Steve Thomas, Global Business Manager - Titanium Intermediates, DuPont Titanium Technologies
- 4) Rebuttal Verified Statement of Thomas D Crowley, President, L E Peabody and Associates, Inc , Alexandria, Virginia

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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E I DUPONT DE NEMOURS AND COMPANY)	
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Complainant,)	
)	
v)	Docket No 42100
)	
CSX TRANSPORTATION, INC)	
)	
Defendant.)	
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**REBUTTAL VERIFIED STATEMENT OF MARY PILEGGI
E I DUPONT DE NEMOURS AND COMPANY**

1 My name is Mary Pileggi. I am the U.S./Canada Regional Logistics Manager for E I du Pont de Nemours and Company ("DuPont" or the "Company") in Wilmington, DE. I am the same Mary Pileggi who submitted a Verified Statement as part of the Opening Evidence filed by DuPont in this proceeding on February 4, 2008. I am submitting this Rebuttal Verified Statement in response to claims made CSX Transportation, Inc. ("CSXT") in its Reply Evidence filed on March 5, 2008.

2 I was extremely disappointed to read the Reply Verified Statement of CSXT Witness Dean Piacente, in which Mr. Piacente accuses DuPont of choosing to route hazardous materials wherever DuPont wants them to go, no matter how dangerous the commodity or how great the distance. Based upon Mr. Piacente's testimony, CSXT asserts that DuPont is "shift[ing] the costs of its activity onto others, and thwarting CSXT's efforts to discourage long hauls of chlorine and other ultra-hazardous commodities." CSXT Reply Ev. at 46.

3 DuPont takes these accusations seriously. Due to the hazardous nature of many of the commodities that DuPont produces and uses, safety is our highest priority. When it comes to

PUBLIC VERSION

safety. DuPont and its rail carriers must work together very closely to attain a zero release objective. This means that, even though DuPont is at odds with CSXT on pricing, there must be no disagreement on safety.

4 DuPont and CSXT have worked together well to successfully achieve this objective. DuPont recently received CSXT's 2007 Chemical Safety Excellence Award, because DuPont had zero non-accidental releases of any hazardous material in 2007. Mr. Piacente himself presented this award to DuPont. Therefore, DuPont is surprised by Mr. Piacente's accusations.

5 Contrary to Mr. Piacente's assertions, distance is a very important consideration in all DuPont decisions for sourcing chlorine and other TIH commodities. DuPont has made this such an important factor because of its commitment to enhancing safety. This is not the result of any pricing incentives or disincentives imposed by CSXT or any other rail carrier.

6 For more details on the DuPont commitment to safety, I request that the Board also read the Reply and Rebuttal Verified Statements of Michelle Moore and the Rebuttal Verified Statement of Steve Thomas, both DuPont employees. Each responds specifically to other serious inaccuracies and misrepresentations in CSXT's evidence within their particular realm of experience and expertise.

7 Finally, CSXT's claim that rail shipments of chlorine from Natrium, WV to New Johnsonville, TN are "insignificant and transitory" is false. In 2006 and 2007, DuPont tendered [REDACTED]¹ cars of chlorine over this lane, respectively. Although DuPont ships a much larger volume of chlorine between these two points by barge, rail remains an integral and necessary part of the supply chain because barges are not available at all times, and when available, they are incapable of handling all of the chlorine consumed by DuPont at New Johnsonville.


¹ All shaded text is CONFIDENTIAL and HIGHLY CONFIDENTIAL information that has been redacted from the public version of this pleading.

VERIFICATION

STATE OF DELAWARE)
)
CITY OF WILMINGTON)

I, Mary Pileggi, verify under penalty of perjury that I have read the foregoing Verified Statement of Mary Pileggi, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on April 2, 2008



Mary Pileggi

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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E I DUPONT DE NEMOURS AND COMPANY)	
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Complainant,)	
)	
v)	Docket No 42100
)	
CSX TRANSPORTATION, INC.)	
)	
Defendant)	
<hr/>)	

**REBUTTAL VERIFIED STATEMENT OF MICHELLE MOORE
E I DUPONT DE NEMOURS AND COMPANY**

1 My name is Michelle Moore I am an Executive Buyer for E I du Pont de Nemours and Company ("DuPont") in Wilmington, DE I have been an employee of DuPont since 1988 In am the same Michelle Moore who submitted a Verified Statement as part of the Reply Evidence filed by DuPont in this proceeding on March 5, 2008 I am submitting this Rebuttal Verified Statement in response to claims made CSX Transportation, Inc ("CSXT") in its Reply Evidence filed on March 5, 2008

2 In my Reply Verified Statement, I responded to CSXT's allegations that DuPont purchases chlorine from the cheapest source without regard to the transportation risks I explained the key factors that DuPont considers when it selects chlorine suppliers Because all chlorine is not alike, I noted that DuPont must certify a production facility for the quality and specifications that DuPont requires in each of its production processes In order to ensure a reliable supply of chlorine at the quantities needed, DuPont attempts to qualify and use more than one source for each production facility DuPont requires route risk assessments for the transportation of all TTH commodities, including the selection of the shortest route available

when that route poses the lowest overall risk [REDACTED]

[REDACTED]¹ Thus, transportation risk is in fact a major consideration in the supply sourcing decisions made by DuPont

3 CSXT claims that its new pricing paradigm is designed to discourage both unnecessary and longer distance TIH shipments I seriously question CSXT's qualifications to decide when a TIH shipment is unnecessary or when a shorter distance alternative is available

4. For example, with respect to chlorine, there are many factors that CSXT would have to consider that are well beyond its ability and expertise First, CSXT would have to know the location of every source of chlorine. Second, CSXT would have to know the purity and specifications of the chlorine produced at each source and the processes in which it can be used Third, CSXT would need to know the total production capacity at each source and how much of that capacity is available for sale Fourth, CSXT would need to know the total volume and quality specifications of chlorine required by the end user

5 CSXT has mischaracterized the rail shipments of chlorine from Natrium, WV to New Johnsonville, TN as "transitory and insignificant " There will always be regular rail shipments of chlorine to New Johnsonville, because both rail and barge are required to ensure that DuPont has sufficient chlorine available to meet its needs

6. CSXT wrongly claims that there is sufficient barge capacity to handle all of the chlorine that DuPont purchases from Natrium for use at New Johnsonville [REDACTED]

[REDACTED]

[REDACTED]

¹ All shaded text is CONFIDENTIAL and HIGHLY CONFIDENTIAL information that has been redacted from the public version of this pleading

[REDACTED]

[REDACTED]

7 CSXT also incorrectly surmises that DuPont could purchase more chlorine by barge and store it at New Johnsonville, in order to avoid rail transportation. The fixed storage capacity at New Johnsonville consists of [REDACTED], into which all chlorine is unloaded from barges and rail cars. From those tanks, the chlorine goes directly into the production process.

[REDACTED] DuPont must continually refill those tanks from either barge or rail throughout the day.

8. This limited storage capacity is a major reason why rail remains an integral part of the DuPont supply chain. Since DuPont must continually refill these storage tanks, rail cars ensure that there will always be a continuous supply of chlorine in between barge deliveries.

VERIFICATION

STATE OF DELAWARE)
)
CITY OF WILMINGTON)

I, Michelle Moore, verify under penalty of perjury that I have read the foregoing Reply Verified Statement of Michelle Moore, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on April 3, 2008


Michelle Moore

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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E I. DUPONT DE NEMOURS AND COMPANY)	
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Complainant,)	
)	
v)	Docket No 42100
)	
CSX TRANSPORTATION, INC)	
)	
Defendant)	
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**REBUTTAL VERIFIED STATEMENT OF STEVE THOMAS
E I DUPONT DE NEMOURS AND COMPANY**

1. My name is Steve Thomas. I am the Global Business Manager – Titanium Intermediates for DuPont Titanium Technologies, a business unit of E I. du Pont de Nemours and Company ("DuPont") in Wilmington, DE I have been an employee of DuPont since 1983 In my current position, I am responsible for the global sales and marketing of titanium tetrachloride, a TIH commodity I am submitting this Verified Statement to correct numerous inaccurate claims and assertions of fact made by CSX Transportation, Inc ("CSXT") about the production of titanium tetrachloride at New Johnsonville

2. Through Mr Piacente, CSXT accuses DuPont of shipping its hazardous materials products without regard to danger or distance To support this very serious accusation, Mr Piacente cites the production of titanium tetrachloride by DuPont at New Johnsonville as an example Specifically, he alleges that DuPont is expanding its New Johnsonville plant to manufacture titanium tetrachloride for use at a new paint manufacturing facility in Utah that will require a rail movement of over 1000 miles But, Mr Piacente gets his facts completely wrong at even the most basic levels

PUBLIC VERSION

3 First, DuPont is not expanding its New Johnsonville facility to manufacture titanium tetrachloride. DuPont already produces titanium tetrachloride at New Johnsonville and has done so for nearly 50 years. At New Johnsonville, DuPont produces titanium dioxide. Titanium tetrachloride is an intermediate in the production of titanium dioxide. DuPont is installing purification facilities to purify its current titanium tetrachloride production for use in titanium metal production.

4. This brings me to Mr. Piacente's second gross inaccuracy. DuPont is not shipping titanium tetrachloride to Utah for use in a paint manufacturing facility. The Utah facility will produce titanium sponge, which is the basic starting material for producing titanium metal. Titanium metal is a vital strategic material used in military and aerospace applications, among others. Currently, there are only two significant facilities that produce titanium sponge in the entire country and they are located in Nevada and Oregon. DuPont will be shipping titanium tetrachloride to a third facility under construction in Utah. Contrary to statements made by CSXT, however, the Utah facility will not be owned or operated by DuPont.


5 Titanium tetrachloride is safely transported by rail car today. DuPont will ship the titanium tetrachloride from New Johnsonville to its customer in Utah in rail cars that meet or exceed US DOT packaging requirements in order to provide a high level of safety and protection to the public.

6. DuPont has a long history of focusing on the safety of its employees, customers, and the general public, dating back to its beginnings as a producer of gunpowder. For a description of the factors that DuPont considers and the steps that DuPont takes in order to minimize hazardous material transportation risks, please read the Reply and Rebuttal Verified Statements of Michelle Moore, another DuPont employee.

VERIFICATION

STATE OF DELAWARE)
)
CITY OF WILMINGTON) *Deane C. Patterson*
 Notary
 April 2, 2008

I, Steve Thomas, verify under penalty of perjury that I have read the foregoing Rebuttal
Verified Statement of Steve Thomas, that I know the contents thereof, and that the same are true
and correct Further, I certify that I am qualified and authorized to file this statement

 4/2/08
Steve Thomas

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

E. I. duPont de Nemours and Company)	
)	
Complainant)	
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v.)	Docket No. NOR 42100
)	
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CSX Transportation, Inc.)	
)	
Defendant)	

Rebuttal
Verified Statement

of

Thomas D. Crowley
President
J. E. Peabody & Associates, Inc.

Due Date: April 4, 2008

PUBLIC VERSION

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LIST OF EXHIBITS

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>
DDC-21	Comparison of DuPont and CSXT Reply Evidence "Final Offer" Comparable Groups for the Niagara Falls Movement
TDC-22	Comparison of DuPont and CSXT Reply Evidence "Final Offer" Comparable Groups for the Natrium Movement
TDC-23	Comparison of DuPont and CSXI Reply Evidence "Final Offer" Comparable Groups for the Carneys Point Movement
DDC-24	Impact of Rounding of Issue Traffic Miles on DuPont's TIH Comparable Groups and Maximum R/VC Ratio
DDC-25	Comparison of DuPont's Reply Comparable Group R/VC Ratio Range and Average by Year – TIH
DDC-26	Rate of Return Implicit in DuPont's Line-Haul Rates For TIH Movements on CSXI
DDC-27	Comparison of Application of CAPM Cost of Capital in DuPont's Reply to CSXI's Suggested Application Methodology – TIH

I. INTRODUCTION

My name is Thomas D. Crowley. I am the same Thomas D. Crowley who filed verified statements in this proceeding on February 4, 2008 ("Opening VS") and March 5, 2008 ("Reply VS") on behalf of E. I. duPont de Nemours and Company ("DuPont"). My qualifications and experience are attached to my Opening VS as Exhibit (IDC-1).

DuPont is requesting that the Surface Transportation Board ("STB") prescribe reasonable rates, service terms and reparations associated with the transportation of chlorine via CSX Transportation, Inc. ("CSX") for the following three (3) movements:

1. Niagara Falls, NY to New Johnsonville, TN ("Niagara Falls Movement"),
2. Natrium, WV to New Johnsonville, TN ("Natrium Movement"), and
3. Niagara Falls, NY to Carneys Point, NJ ("Carneys Point Movement").

In my Opening VS, I applied the STB's procedures for the Three-Benchmark Methodology specified in the STB's September 5, 2007 decision in Ex Parte No. 646 (Sub-No. 1) Simplified Standards for Rail Rate Cases ("Simplified Standards") and provided the following information in support of DuPont's request:

1. The revenue / variable cost ("R/VC") ratio for each of the issue movements.
2. The selection of comparable CSXT movements from the STB's Unmasked Confidential Waybill Sample ("Waybill Sample") for CSX1 for each year 2002 through 2005.
3. The upper boundary of the R/VC ratio for the comparable group (referred to as the Maximum R/VC Ratio) for each of the issue movements following the STB's procedures specified in Simplified Standards.

- 4 The identification and quantification of other relevant factors, and
- 5 The relief to which DuPont is entitled for each issue movement

Simultaneous with the filing of DuPont's Opening evidence on February 4, 2008, CSXT filed its Opening evidence in this proceeding. In my Reply VS, I critiqued and responded to CSXT's Opening evidence and incorporated revisions to the analyses included in my Opening VS. My Reply VS included the "Final Offer" comparable groups for each issue movement.¹

Simultaneous with the filing of DuPont's Reply evidence on March 5, 2008, CSXT filed its Reply evidence in this proceeding with its "Final Offer" comparable groups for each of the issue movements.

In my Rebuttal verified statement ("Rebuttal VS"), I respond to CSXT's Reply evidence criticisms of my Opening VS and provide a critique of CSXT's Reply evidence analyses and results. My Rebuttal VS is summarized under the following headings:

- II Variable Costs and R/VC Ratios for the Issue Movements
- III Comparable Group Selection
- IV Other Relevant Factors
- V Relief for DuPont

¹ See Reply VS Exhibit (IDC-16), Exhibit (IDC-17) and Exhibit (IDC-18).

**II VARIABLE COSTS AND R/VC
RATIOS FOR THE ISSUE MOVEMENTS**

As discussed in my Reply VS at pages 3 through 7, CSXT and DuPont agreed on the rates for the issue movements but disagreed on the variable costs. I identified two differences between DuPont's and CSXI's Opening evidence calculation of variable costs and explained why CSXI was incorrect in both instances.

In its Reply evidence, CSXI did not address differences in the parties' variable cost calculations. The correct variable costs and R/VC ratios for the issue movements are shown in Tables 3 and 4, respectively, in my Reply VS.

III. COMPARABLE GROUP SELECTION

The STB's decision in Simplified Standards specified the procedures to develop the Maximum RVC Ratio for the issue movements using the Three Benchmark Methodology. The primary component of the specified procedures is the selection of the comparable group for the issue movement as it forms the basis for all subsequent calculations. Each party selects its initial comparable group for the issue movement and submits it in simultaneous opening evidence filings. After reviewing the other party's opening evidence, each party has the option to make modifications to its initial comparable group but is restricted to the universe of movements submitted in opening, i.e. by the combination of movements submitted by both parties. On Reply, each party must submit its final offer comparable group for the issue movement without the benefit of evaluating criticisms from the other party. On Rebuttal, each party may critique the other party's "final offer" comparable group.

In my Opening VS, I presented three comparable groups, i.e., one for each issue movement. In my Reply VS, I critiqued CSXI's single comparable group that it filed for all three of the issue movements. I also modified my three comparable groups based on CSXI's Opening evidence. In its Reply, CSXI critiqued my opening comparable groups and revised its opening single comparable group by adopting some of DuPont's selection criteria and developing a separate comparable group for each issue movement. My review of CSXI's Reply evidence and my discussion of the remaining differences in the comparable movement selection criteria are summarized below under the following topics:

A. Comparison of Comparable Groups

B Differences in Selection Criteria

**A. COMPARISON OF
COMPARABLE GROUPS**

In my Opening VS, I included three separate comparable groups, one for each issue movement. In its Opening evidence, CSXT included only one comparable group and used it for all three issue movements. In my Reply VS at pages 10 through 26, I compared the respective initial comparable groups and developed the "final offer" comparable groups for each issue movement. In CSXT's Reply evidence at pages 10 through 26, CSXT addressed the differences between the parties' initial comparable groups, agreed that a separate comparable group was needed for each issue movement, and developed its "final offer" comparable groups for the issue movements. In this Rebuttal, I have developed a comparison of CSXT's "final offer" comparable groups to each of the three "final offer" comparable groups from my Reply VS.

Exhibit_(TDC-21) compares my Reply comparable group for the Niagara Falls Movement to the Reply comparable group presented by CSXT. Exhibit_(TDC-21) is broken into two sections. The first section lists the movements in my Reply VS comparable group ("DuPont Section"). These movements are color-coded to identify whether or not they were included in CSXT's comparable group. Movements shaded in blue were included in CSXT's Reply comparable group. Movements shaded in yellow were not included in CSXT's Reply comparable group. For the yellow-shaded movements, I identified one or more of the following reasons as to why that particular movement was not included in CSXT's comparable group based on CSXT's Reply description of its selection criteria:

1. The SIC Code was other than 2812815

- 2 The miscellaneous charges were zero, and/or
- 3 It was identified as an issue movement

The applicable reason(s) for exclusion from CSXI's Reply comparable group is/are identified by numbers 1 through 3 (corresponding to the above three reasons) which were placed to the left of each yellow-shaded movement on Exhibit_(TDC-21)

The second section of Exhibit_(TDC-21) lists the movements in CSXT's Reply comparable group and compares them to the comparable group I submitted in Reply for the Niagara Falls Movement ("CSXI Section"). CSXI's movements are color-coded to identify whether or not they were included in my Reply comparable group. Movements shaded in blue were included in my Reply comparable group.² Movements shaded in green were not included in my Reply comparable group. For the green-shaded movements, I identified that the only reason why that particular movement was not included in my Reply comparable group was that the miles for the movement fell outside the mileage range specified in my selection criteria, i.e., outside +/- 150 miles of the miles for the issue movement rounded to the nearest 50-mile increment.

Exhibit_(TDC-22) contains the same comparisons for the Natrium Movement. Exhibit_(TDC-23) contains the same comparisons for the Carneys Point Movement. My discussion of the reasons for the differences between CSXT's Reply comparable groups and my Reply comparable groups for each issue movement is contained in the following section.

² These are the same movements shaded in blue in the DuPont Section of Exhibit_(TDC-21)

**B. DIFFERENCES IN
SELECTION CRITERIA**

In my Opening VS. at pages 8 through 10, I explained how I selected the comparable movements from the STB's Waybill Samples for 2002 through 2005 to develop comparable groups for each of the three issue movements. At pages 18 through 24 of its Opening filing, CSXT explained how it selected the single comparable group that it applied to all three movements at issue. At pages 12 through 23 of my Reply VS. I critiqued the differences between the respective parties' Opening comparable groups. At pages 10 through 23 of its Reply evidence, CSXT did the same.

The comparison of the Reply comparable groups submitted by DuPont and CSXT discussed above identified only four remaining differences in selection criteria. My discussion of these differences is contained under the following headings:

1. Comparable STCC's
2. Miscellaneous Charges
3. Issue Movements
4. Length of Haul
5. Summary

1. Comparable STCC's

One of the comparable group selection criteria identified at page 8 in my Opening VS was that the commodity had to be classified as a IIII because the issue movements of chlorine are classified

as FHH. This criteria was based on the special handling requirements for FHH commodities when moved by railroad.

In Opening CSXI restricted its comparable group to a single FHH commodity, i.e., chlorine, STCC 2812815 and presented two explanations as to why anhydrous ammonia movements and other FHH movements are not comparable to the issue chlorine movements.

In my Reply VS. at pages 14 through 16, I responded to CSXI's explanations, demonstrated why they were invalid and showed why anhydrous ammonia and other FHH movements are comparable to the issue chlorine movements. In my Reply VS, my comparable groups for each of the three issue movements continued to include FHH movements rather than just chlorine movements.

In its Reply at pages 15 through 19 CSXI continued to restrict its comparable groups to only chlorine movements and offered several additional reasons why the inclusion of movements other than chlorine is improper. Each of CSXI's reasons put forth in Reply is discussed below.

First, CSXI claims that the FHH classification is not a marketing classification and relates only to the hazardous nature of the commodity. All FHH movements are handled in the same manner by CSXI due to their hazardous nature which makes them comparable from a transportation standpoint. CSXI's position in this proceeding is that the risk associated with transporting chlorine is so great that CSXI is pricing its services in a manner to discourage shippers from moving it on CSXI. This

risk is the same for all TIIH commodities so it stands to reason that CSXI's pricing policy would be the same for all TIIH commodities meaning that they are comparable.²

Second, CSXI claims that anhydrous ammonia and chlorine are used in different products and have different values. End use of the product and product value are not cited among the items that drive CSXI pricing that are listed on page 22 of Appendix 4 to CSXT's Opening evidence. However, risk is listed as an item that drives CSXI pricing and that risk is the same for all TIIH commodities.

Third, CSXI claims that there are more viable transportation options for anhydrous ammonia than for chlorine and this keeps the rates down. On the one hand, CSXI is claiming that it decreases rates for anhydrous ammonia because it faces competition from other modes of transportation while on the other hand CSXI is claiming that it is increasing rates for TIIH commodities to discourage long haul transportation and reduce CSXT's risk. CSXI cannot have it both ways. Competition from other modes of transportation would not constrain CSXT rates because CSXT wants the TIIH commodities to move via other modes of transportation.

Fourth, CSXI claims that chlorine and anhydrous ammonia are not included in the same business group for marketing as chlorine is handled by Chemicals and anhydrous ammonia is handled by Phosphates and Fertilizers. CSXT's website shows a Business Group for Chemicals and Fertilizer and CSXI witness Dean Piacente is the Vice President - Chemicals and Fertilizers.

² CSXI Opening evidence Appendix 5 is a CSXI marketing presentation that outlines requirements to reduce the risk to CSXI's finances and reputation associated with all TIIH commodities, not just chlorine.

Fifth, CSXT claims that chlorine and anhydrous ammonia are not comparable because revenues for chlorine movements are 30% higher than for anhydrous ammonia movements. Simplified Standards relies on comparisons of R/VC ratios, not revenue levels. The purpose of the Three Benchmark Methodology is to identify the R/VC ratios for comparable movements, not identify the R/VC ratios of movements with similar revenue per car. CSXT used an index for the Waybill Sample revenues⁴ based on the revenue per car for chemical movements including both chlorine and anhydrous ammonia (as well as other HH commodities).

Finally, CSXT attempts to disparage the inclusion of similar HH commodities in my comparable groups by stating that Chloropierin (SICC 2818830) and Nitric Acid (STCC 2819215) were excluded and therefore DuPont did not follow its own selection criteria. A review of the records in the Waybill Sample revealed that including these SICC's, applied to DuPont's Reply selection criteria, would have added (a) one (1) movement to the twenty-eight (28) comparable movements for the Niagara Falls Movement, (b) four (4) movements to the ninety-nine (99) comparable movements for the Natrium Movement, and (c) three (3) movements to the one hundred sixty-nine (169) comparable movements for the Carneys Point Movement. The inclusion of these very few movements would have little, if any, impact on the Maximum R/VC Ratio for each comparable group.

Based on the information contained above and in my Reply VS, HH movements are comparable to the issue chlorine movements and should be included in the comparable groups.

⁴ As discussed in my Reply VS at pages 37 through 44 and subsequently in this Rebuttal VS, CSXT's indexing of revenues in the Waybill Sample is erroneous and improper.

2. Miscellaneous Charges

At page 19 of its Reply CSXI claims it appropriately limited its comparison groups to only those movements for which CSXI applied a fuel surcharge while DuPont did not apply this limitation. CSXI uses the Miscellaneous Charges field in the Waybill Sample as the identifier as to whether or not a movement was assessed a fuel surcharge.

This fuel surcharge issue was addressed at pages 16 through 18 of my Reply VS and CSXI raises no new arguments in its Reply.

First CSXI provided no evidence of a link between fuel surcharges and miscellaneous charges reported in the Waybill Sample. The Waybill Sample User Guide provided by the STB along with the Waybill Sample defines Miscellaneous Charges as "The total of all miscellaneous charges, excluding transit and freight revenue charges, shown in dollars." The definition clearly encompasses more than fuel surcharge revenues.

Second CSXI did not provide any evidence that it reports fuel charges separately in the miscellaneous charges field of the Waybill Sample or that fuel surcharges are the only monies reported in the miscellaneous charges field.

Lastly CSXI attempted to justify its exclusion of movements with no miscellaneous charges, which CSXI equates to fuel surcharges, by stating that fuel prices have nearly tripled from January 2002 to January 2008 and more than doubled from January 2002 to December 2005, the time period

covered by the Waybill Sample.² CSXT gives the impression that it was not compensated for increasing fuel prices if there was no fuel surcharge shown for a movement. Even assuming that the miscellaneous charges did reflect fuel surcharges, the lack of miscellaneous charges does not mean that CSX was not compensated for increasing fuel prices.

Exhibit_(TDC-13) to my Reply VS contained a comparison of the increase in the EIA U.S. No. 2 Diesel fuel price cited by CSX and the fuel component of the Rail Cost Adjustment Factor (RCAF) used to adjust rates for rail traffic. As shown in Reply Exhibit_(TDC-13), the fuel component of the RCAF increased at a faster rate than EIA's U.S. No. 2 Diesel price. Specifically, the fuel component of the RCAF nearly quadrupled from 1Q02 to 1Q08 and more than tripled from 1Q02 to 4Q05. Even if there was no separate fuel charge, the rate adjustment mechanism, e.g., the RCAF, was capturing the increase in CSX's fuel prices.

For the above reasons, CSX's exclusion of comparable movements simply on the basis of zero miscellaneous charges is improper.

3. Issue Movements

Although not discussed in CSX's Reply evidence, there is a difference between the parties on the methodology used to exclude issue movements from the comparable groups for the Natrium and Carneys Point Movements. Specifically, CSX excluded movements between Natrium and New Johnsonville from the Niagara Falls to Carneys Point comparable group and excluded movements between Niagara Falls and Carneys Point from the Natrium to New Johnsonville comparable group.

² See footnote 17 on page 21 of CSX's Opening evidence.

As discussed in my Reply VS. at pages 13 through 14, I excluded the issue movements from the comparable groups separately for each issue movement. Stated differently, in my final comparable group for the Niagara Falls Movement included in Reply, I excluded all Niagara Falls to New Johnsonville movements from the comparable group but included any movements between Natrium and New Johnsonville or Niagara Falls to Carneys Point as these two latter movements are not issue movements for purposes of the Niagara Falls Movement. I excluded the issue movements for the Natrium Movement and the Carneys Point Movement in the same manner.

CSX's methodology for excluding issue movements is improper.

4. Length of Haul

In my Opening VS. at page 9, I explained that one of my selection criteria for comparable movements was loaded miles within a range of plus or minus 150 miles of the issue movement loaded miles rounded to the nearest 50 miles. This resulted in mileage ranges of 750 to 1,050 miles for the Niagara Falls Movement, 550-850 miles for the Natrium Movement and 450-750 miles for the Carneys Point Movement. In my Reply VS, I continued to rely on these mile ranges when selecting my "final offer" comparable groups for each issue movement.

In Opening, CSX's selection criteria was much broader, i.e., CSX included movements in the comparable group with mileages as low as 211 miles and as high as 1,576 miles. CSX's broad mileage range was critiqued at pages 22 through 23 of my Reply VS.

In Reply CSXI accepted the mileage range of plus or minus 150 miles but applied it incorrectly. CSXI attempts to justify its misapplication by claiming that DuPont committed two errors in its mileage selection. First, CSXI takes issue with the rounding of the issue movement miles to the nearest 50-mile increment prior to the application of the plus or minus 150 mile range. Second, CSXI disagrees with the issue movement miles used by DuPont. As explained below, neither of these differences are errors.

DuPont's rounding of the issue miles to the nearest 50-mile increment was the criteria selected to identify comparable movements in the Waybill Sample. There was no intention to identify more shorter or more longer movements as CSXI seems to infer in its discussion at page 22 of its Reply evidence.

To test the impact of DuPont's 50-mile rounding criteria, I used the universe of comparable movements selected by each party in Opening and applied the selection criteria I used in Reply for the selection of the final offer comparable groups changing only the mileage range to plus or minus 150 miles of the issue movement miles as calculated by DuPont. The result, shown in Exhibit (TDC-24), is that the rounding of the issue miles has very little impact on the comparable group and the resulting Maximum R/VC Ratio. Specifically, for the Niagara Falls Movement, the number of comparable movements decreases from 28 to 25 and the Maximum R/VC Ratio increases from 290% to 297%. For the Natrum Movement, the number of comparable movements increases from 99 to 100 and the Maximum R/VC Ratio increases from 330% to 331%. For the Carneys Point Movement, the number of comparable movements decreases from 169 to 166 and the Maximum R/VC Ratio decreases from 326% to 321%. Stated differently, the impact of rounding the issue

movement miles has virtually no impact on the comparable groups and the Maximum R/VC Ratios and causes the results to both increase and decrease demonstrating that there is no bias in the rounding

C SXT's disagreement with DuPont's issue movement miles used to determine the starting point for the mileage range has no merit. As I explained at pages 5 through 6 of my Reply VS C'SXI improperly relied on miles from internal data prohibited by the STB. DuPont properly relied on miles obtained from the same source used to develop the miles for the movements in the Waybill Sample.

5. Summary

C SXI has improperly and unreasonably narrowed the comparable groups by restricting the movements to only chlorine as III movements are clearly comparable. C'SXT has also improperly and unreasonably narrowed the comparable groups by including only those movements with miscellaneous charges greater than zero. C'SXT has improperly excluded comparable movements under the guise of issue movements. Finally, C'SXI has improperly applied the mileage range by relying on miles developed using information that the SIB has prohibited from these proceedings.

DuPont's comparable groups should be accepted by the SIB.

IV. OTHER RELEVANT FACTORS

In this section of my Rebuttal VS, I respond to CSXT's Reply evidence pertaining to the other relevant factors included by CSXT. Then, I respond to CSXT's Reply evidence criticism of DuPont's other relevant factors. These discussions are contained below under the following headings:

A. CSXT's Other Relevant Factors

B. DuPont's Other Relevant Factors

A. CSXT'S OTHER RELEVANT FACTORS

My discussion of CSXT's other relevant factors addresses the two factors developed by CSXT in its evidence, i.e. (1) an adjustment to RSAM Ratio, and (2) indexing of Waybill Sample variable costs and revenues.

1. Adjustment to RSAM Ratio

In my Reply VS at pages 32 through 37, I explained why CSXT's adjustment to the RSAM Ratio for an alleged failure to include taxes was improper and erroneous. In its Reply evidence, at page 29, CSXT refers to this correction as simply a "technical correction" and claims that it is different from the "organic change to the RSAM proposed by DuPont." CSXT offers no support for its contention that the STB erred in Simplified Standards. CSXT's adjustment should be rejected by the STB.

2. Indexing of Waybill Sample Variable Costs and Revenues

In my Reply VS at pages 37 through 44 I explained why CSXI's indexing of Waybill Sample variable costs and revenues was improper, unsupported and unnecessary.

In its Reply, at pages 25 through 27 CSXI continues to assert that the 2002 to 2005 revenue and variable cost data for the comparable group from the Waybill Sample provides an inconsistent comparison for evaluating the R/VC ratios of the challenged rates and must be indexed to 2007. In support of its position CSXI includes a table showing the changes in average revenue per carload for chemicals and chlorine traffic. CSXI's comparison is irrelevant.

The purpose of Simplified Standards is to determine the reasonable rate for the issue traffic based on the R/VC ratios of comparable movements. Simplified Standards does not base this determination on revenue alone. CSXI's analysis only reflects one of the two components of the R/VC ratio, i.e. the revenue component.

To demonstrate that indexing is not required, I developed the range and average R/VC ratios for the comparable movements included in DuPont's "final offer" comparable groups included in my Reply VS. The results of this analysis are shown on Exhibit_(TDC-25).

Exhibit_(TDC-25) shows that the R/VC ratios for the comparable movements over the four-year period of 2002-2005 cover a wide range each year but the annual averages are within a much narrower band. Exhibit_(TDC-25) also shows that the R/VC ratios are higher in the earlier years. This supports the STB's position at pages 84-85 of Simplified Standards that no indexing of revenues or variable costs is necessary as the R/VC ratios will reflect the annual changes in revenues

and variable costs. Applying CSXT's indexing methodology to the revenues and variable costs will artificially increase the R/VC ratios of the comparable movements as shown by the high R/VC ratios presented in CSXT's evidence.

B. DUPONT'S OTHER RELEVANT FACTORS

In my Opening VS, I included two other relevant factors and quantified their application on the calculation of the Maximum R/VC Ratio for the issue movements. In my Reply VS, I performed the same analyses applied to the "final offer" comparable groups for each issue movement. In its Reply, CSXT criticized the two other relevant factors presented in my testimony. CSXT's criticisms and my responses are discussed under the following topics:

1. STB's RSAM Ratio Adjusted for Efficiency
2. STB's RSAM and R/VC₁₀₀ Ratios Adjusted for the STB's New Cost of Capital Methodology

1. STB's RSAM Ratio Adjusted for Efficiency

At pages 11-12 of my Opening VS, I described the methodology I used to adjust the STB's RSAM for efficiency. I used that same methodology in my Reply VS.

In its Reply, at pages 39 through 41, CSXT claimed that DuPont's RSAM ratio adjusted for efficiency should be rejected by the STB. The Long-Cannon factors address the amount of traffic transported by a railroad (a) at revenues that do not cover costs and (b) at revenues that contribute only marginally to fixed cost. Simplified Standards allows a party to introduce evidence on other

relevant factors including that the defendant railroad is not operating as efficiently as it could. My efficiency adjustment addresses these Long Cannon concerns.

My adjustment to the RSAM ratio by excluding movements with a R/VC ratio less than 1.0 satisfies both of these objectives. First, it eliminates the inefficiency of CSXT handling traffic that does not cover its cost or contributes only marginally to fixed costs. Second, it satisfies the other relevant factors component of Simplified Standards as I have quantified the impact on the calculation of the maximum R/VC ratios for the issue movements.

**2. STB's RSAM and R/VC_{>1.00}
Ratios Adjusted for the STB's
New Cost of Capital Methodology**

At pages 13-15 of my Opening VS, I described the methodology I used to incorporate the STB's January 17, 2008 decision in Ex Parte No. 664 Methodology to be Employed in Determining the Railroad Industry's Cost of Capital ("Cost of Capital") to replace its single-stage Discounted Cash Flow ("DCF") model with a Capital Asset Pricing Model ("CAPM") to determine the cost of equity component in the cost of capital calculation. I used that same methodology in my Reply VS.

In its Reply, at pages 29 through 38, CSXT put forth several reasons why DuPont's adjustment should not be accepted by the STB. Before I discuss the reasons why I believe CSXT's position should be rejected, I will summarize the return on equity implicit in the line-haul rates that CSXT's evidence suggests should be charged to move the issue traffic. Table 1 below compares the return on equity included in the 2005 CAPM WACC to the return on equity included in the rate levels suggested by CSXT's evidence on pre-tax and after-tax bases.

Table 1
Comparison Of Return On Equity
Calculate By STB To Return On Equity
Implicit In The Rate Levels Suggested By CSXT

<u>Item</u>	<u>Return On Equity</u>	
	<u>After-Tax</u>	<u>Pre-Tax</u>
(1)	(2)	(3)
1. STB 2005 CAPM WACC	8.4%	12.9%
2. Niagara Fall Movement	99.8%	141.7%
3. Natnum Movement	118.6%	168.4%
4. Carneys Point Movement	117.4%	166.7%

Source: Exhibit (TDC-26)

Table 1 demonstrates that the return on equity implicit in the rate levels suggested by CSXI's evidence are many multiples greater than the STB 2005 CAPM WACC' return on equity

I will now address CSXI's critique of DuPont's cost of capital other relevant factor

First, CSXI states that the STB does not and should not, retroactively apply methodology changes and cites several proceedings in support of its position. CSXI is ignoring one very important consideration i.e. the RSAM calculation is based on a multi-year average. It would be improper and incorrect to adjust the calculation for the CAPM cost of capital in one year and then average it with other years where the adjustment is not made.

Second CSXT claims that this proceeding is not the proper forum for a “far-reaching” retroactive change. CSXT states that the current RSAM methodology was developed as a product of multiple agency proceedings over several years. CSXT’s objection is a double standard. The incorporation of the change to the cost of capital, which the STB has approved, is nothing more than a “technical correction” to use CSXI’s terminology. The STB has the data and programs in place to substitute the CAPM cost of capital into its URCS program to develop revised URCS formulas for the 2002-2005 time period and then apply the revised URCS formulas to the movements in the Waybill Sample to develop the variable costs for each movement. Once this has been completed, the selection process and Maximum R/VC Ratio calculations follow the procedures outline in Simplified Standards.

Third CSXT claims that adjusting for the CAPM cost of capital would add complexity, cost and delay to these proceedings. This is only partially true. There has been some degree of complexity and cost added because DuPont, rather than the STB, has made the calculations to substitute the CAPM cost of capital into the URCS and Waybill Sample process. However, this complexity and cost will disappear in future proceedings once the STB performs these calculations and distributes the revised URCS and Waybill Sample to the parties to these types of disputes. As for delay, CSXI is misguided because the schedule for the instant proceeding has not been modified for this issue.

Fourth CSXT claims that DuPont failed to make other necessary adjustments to fully reflect the impact of the CAPM cost of capital. Specifically, DuPont did not re-cost the comparable group movements or the issue movements using the CAPM cost of capital. CSXI goes on to say that the

comparable group should be re-selected based on the revised R/VC ratios that would result from the revised variable costs using the CAPM cost of capital

CSXI is correct that DuPont did not re-cost the comparable group movements or the issue movements and did not re-select the comparable group as these adjustments are prohibited by Simplified Standards. Specifically, the impact of other relevant factors must be quantified after the comparable group has been selected from the Waybill Sample provided from the STB. That is why DuPont adjusted only the R/VC adjustment ratio applicable to the comparable group movements for the application of the CAPM cost of capital

However, all of the adjustments identified by CSXI can be made and I have done so in this Rebuttal in order to demonstrate that DuPont's methodology provided conservative results. Exhibit_(TDC-27) displays the results of my analysis. The variable cost, maximum R/VC ratio and maximum rate for each of the issue movements based on my Reply VS application of the CAPM cost of capital adjustment are shown in Columns (2) through (4), respectively. Columns (5) through (7) show the results after making the adjustments suggested by CSXI including re-selecting the comparable movements. As CSXI surmised, the maximum R/VC ratio is higher for two of the three movements². However, the application of the higher maximum R/VC ratio to the lower issue movement variable costs results in lower maximum rates than shown in my Reply VS. Based on this analysis, DuPont's methodology for the CAPM costs of capital adjustment is conservative.

² The maximum R/VC ratio for the Niagara Falls Movement is slightly lower due to the inclusion of more comparable movements with R/VC ratios just over 1.80.

In summary, DuPont's modification for CAPM cost of capital is a technical correction, should be made retroactively and can be implemented by the STB with minimal effort even reflecting all the adjustments suggested by CSX I.

V. RELIEF FOR DUPONT

As shown in Table 8 of my Reply VS, DuPont is entitled to relief totaling \$1.01 million using the STB's RSAM and R/VC₁₀₀ ratios subject to the appropriate cap in Three-Benchmark cases. The relief increases to \$1.72 million using the RSAM and R/VC₁₀₀ ratios adjusted for efficiency and to \$1.83 million using the RSAM and R/VC₁₀₀ ratios adjusted only for the CAPM cost of capital (i.e., unadjusted for efficiency), again subject to the appropriate cap.

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VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, THOMAS D CROWLEY, verify under penalty of perjury that I have read the foregoing Verified Statement of Thomas D Crowley, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

Thomas D Crowley
Thomas D Crowley

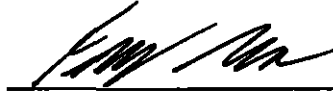
Sworn to and subscribed
before me this 3rd day of April, 2008

Diane R. Kavounis
Diane R Kavounis
Notary Public for the State of Virginia

My Commission expires November 30, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have on this 4th day of April 2008, served a copy of the foregoing Complainant's Rebuttal Evidence on Paul Moates and Paul Hemmersbaugh, Sidley and Austin, 1501 K Street, NW, Washington, D C 20005, via hand delivery and email

A handwritten signature in black ink, appearing to read 'Jeffrey O. Moreno', is written over a horizontal line.

Jeffrey O. Moreno